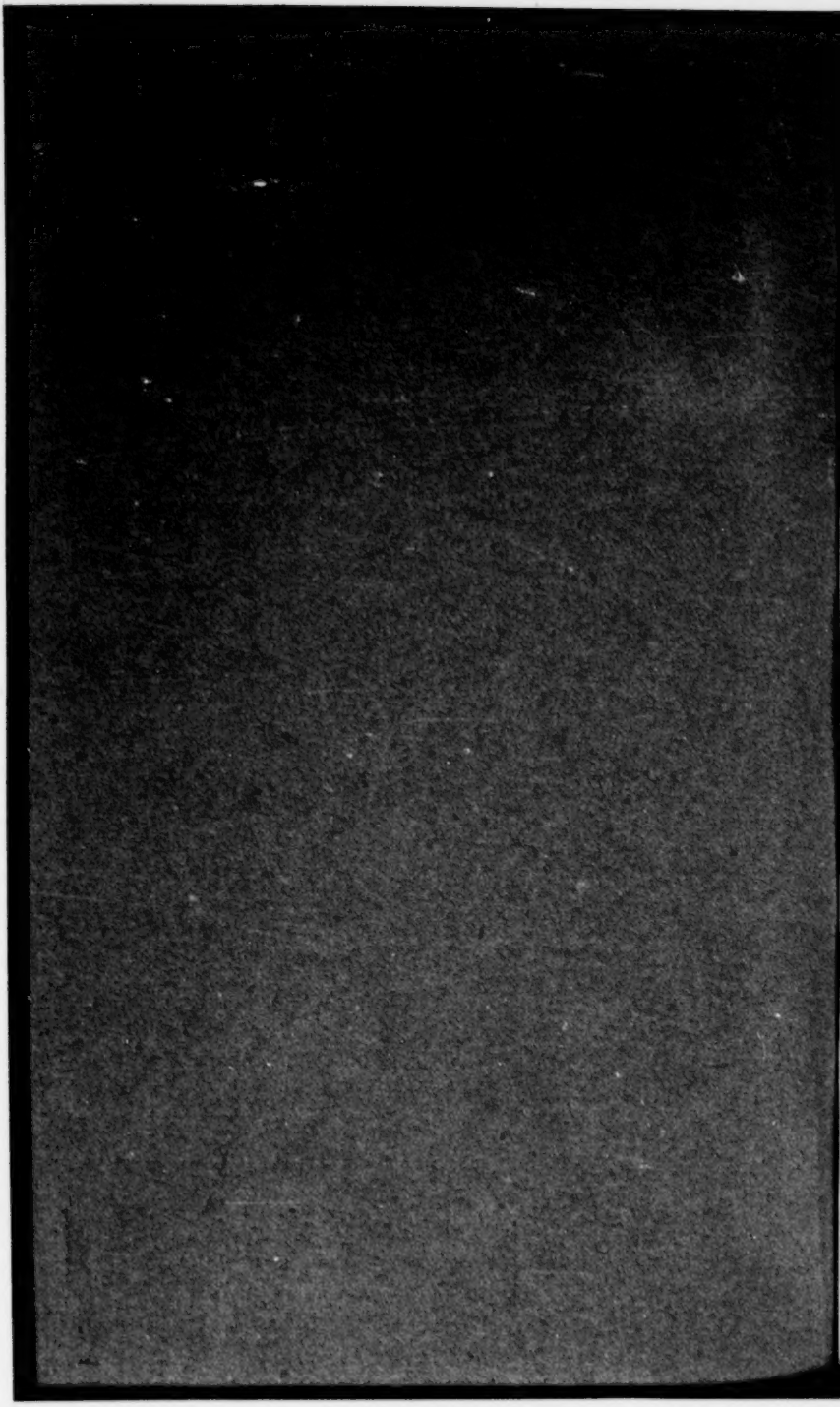

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(18,771.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 183.

THE GLOUCESTER WATER SUPPLY COMPANY, APPELLANT,

vs.

THE CITY OF GLOUCESTER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA, *District of Massachusetts,* } ss:

At a circuit court of the United States for the first circuit begun and holden at Boston within and for the district of Massachusetts on Thursday the fifteenth day of May, in the year of our Lord one thousand nine hundred and two, before the Honorable Le Baron B. Colt, circuit judge.

GLOUCESTER WATER SUPPLY COMPANY, Complainant, v. CITY OF GLOUCESTER, Defendant. } No. 1519. Equity.

The bill of complaint in this cause was filed in the clerk's office on the first day of July, A. D. 1901, and was duly entered at the May term of this court, A. D. 1901, and is in the words and figures following:

2 *Bill of Complaint.*

Filed July 1, 1901.

To the judges of the circuit court of the United States for the district of Massachusetts:

The Gloucester Water Supply Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and located therein, brings this bill of complaint against the City of Gloucester, a municipal corporation duly established under the laws of said Commonwealth and located in the county of Essex and said Commonwealth.

And thereupon your orator complains and says:

1. Your orator, The Gloucester Water Supply Company, is a corporation duly established and existing under, and by virtue of, the provisions of an act of the general court of Massachusetts entitled "An act to incorporate the Gloucester Water Supply Company," approved March 31, 1881, and constituting chapter 167 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1881, a copy of which act, marked "Exhibit A," is hereto annexed and made part hereof; and said corporation is located in said county of Essex.

2. The defendant, City of Gloucester, is a municipal cor-
3 poration duly established and existing by and under chapter 246 of the acts of said general court in the year 1873, and is located in said county of Essex.

3. In the year 1880 an act was passed by said general court, to wit, chapter 203 of the acts of said general court passed in 1880, which act authorized said city to take a supply of water and to construct a plant for the distribution of water, and provided that the same should become void unless accepted by two-thirds of the legal voters of said city present and voting thereon within six months from the passage of said act; and said act was not accepted by said required vote; but your orator is informed and believes, and therefore avers, that it was rejected by a vote of eighty-nine (89) in favor of the acceptance of said act to five hundred and sixty-seven (567) against the same.

A copy of said act of 1880 (chapter 203) marked "Exhibit B" is hereto annexed and made part hereof.

4. The said act of 1881 (chapter 167) was duly accepted by the incorporators named therein; and thereafter a water supply system was duly established and operated as provided in said act; and within three years from the passage of said act said Gloucester Water Supply Company availed itself of the provisions of said act and commenced a prosecution of the work therein authorized; and under date of the twenty-eighth day of September, A. D. 1886 a contract in writing was made, in accordance with the provisions of section 4 of said act of 1881 (chapter 167) between said Gloucester Water Supply Company and said City of Gloucester, a copy whereof marked "Exhibit C" is hereto annexed and made part hereof.

4 And the plaintiff is informed and believes and therefore avers that the said City of Gloucester, by a majority vote of its city council present and voting jointly thereon on or about September 28, 1886, adopted and authorized the making of said contract in behalf of said city, and that said contract was assented to by said city by a majority vote of the voters present and voting thereon at meetings called for that purpose in the several wards of said city, and that said last mentioned voting was held on or about October 19, 1886, and resulted in eight hundred and eighty-three (883) votes assenting to said contract and two hundred and five (205) votes against the same; and that the making of said contract was duly authorized, and the signing thereof both by and on behalf of the plaintiff and defendant herein were duly authorized. And plaintiff says that by said contract it was provided that said company should furnish to said city water for fire purposes for a period of ten years, unless sooner terminated by the purchase of said company's property and franchises by said city in accordance with section seven of chapter one hundred and sixty-seven of the acts of the year eighteen hundred and eighty-one of said Commonwealth. And it was also provided that said company should maintain at all times an ample supply of water in its reservoir on Bond's hill, and should conduct therefrom a supply of water to the full capacity of the main pipes to and for all hydrants furnished under said agreement, so that all hydrants so furnished should be constantly supplied with sufficient water at all times for fire purposes, excepting in such sections as it should be absolutely necessary to cut off tem-

porarily for repairs or extensions; that the said city agreed to pay to the said company sixty dollars ($60.) yearly for each and every hydrant set by said company under said contract, and for the use of water therefrom, and that the said term of years should begin as soon as the hydrant or hydrants ordered and located were set and a test of the efficiency of the same and the water supply was given satisfactory to the city council of said city or to persons by it designated; and in case the city should increase the number of hydrants to one hundred the cost thereafter to said city should not exceed fifty dollars ($50.) yearly for each hydrant.

5. And plaintiff says that a further contract was made and executed between said company and said city dated under date of the fifteenth day of July, 1887, which contract, for convenience is hereafter called contract No. 2, and said contract of September 28, 1886 is hereinafter for convenience called contract No. 1; and plaintiff says that by the terms of said contract No. 2 it was agreed as follows, to-wit;

"It is agreed, that the contract between the parties hereto, dated September twenty-eighth, eighteen hundred and eighty-six, shall, upon the execution of this contract and its ratification by vote as hereinafter set forth, be thereupon and thereby annulled, that except where express reference is herein had to said contract by indenture dated the twenty-eighth day of September, eighteen hundred and eighty-six, said last named contract may be used for the purpose of explaining this instrument; but nothing herein contained shall be construed to mean that said water company shall be released from its obligation, already incurred in regard to the forty hydrants heretofore contracted for by said city, but the same shall be furnished and maintained by said water company, in accordance with the terms of this indenture, the rate or charge for such hydrants being altered agreeably hereto.

Provided however, that this contract shall be of no force and effect until the same has been assented to by said city by a majority vote of all the voters thereof present and voting thereon at a legal meeting called for that purpose as provided in section four of chapter one hundred and sixty-seven of the acts of the year eighteen hundred and eighty-one and amendments thereof."

And plaintiff says, on information and belief, that said contract No. 2 was assented to on or about August 9, 1887, by said city by a majority vote—(to wit, 387 in favor thereof and 240 against the same)—of all the voters thereof present and voting thereon at a legal meeting called for that purpose as provided in section 4 of chapter 167 of the Massachusetts Acts of the year 1881 and amendments thereof, to wit, the act constituting chapter 288 of the Acts and Resolves passed by the general court of Massachusetts in the year 1887, which act amends section 4 of said chapter 167 of the year 1881 by adding at the end of said section the following words.—"Or at any regular municipal election; and the warrant for notifying such meetings if called specially as aforesaid shall specify when the polls shall be opened for the purpose of vot-

ing and when they shall be closed;" and a copy of which act of 1887 (chapter 288) marked "Exhibit D" is hereto annexed and made part hereof.

And plaintiff says that in and by said contract No. 2 it was agreed by the parties thereto as follows.—

That—as said company had introduced water into the streets of said city, and as said city was desirous that its citizens should have the best possible protection against fire,—the said company should furnish said city water for fire purposes for the balance of the period of ten years already agreed upon by contract No. 1, unless sooner terminated by the purchase of said company's property and franchise by said city in accordance with section 7 of chap. 167 of the Acts of the year 1881 of said Commonwealth.

And that said company should set up and maintain during said period one hundred first-class three-nozzle post fire hydrants in addition to the forty hydrants already contracted for in contract No. 1.

7 Also that said company should maintain at all times an ample supply of water to the full capacity of the main pipes to and from all hydrants furnished under said contract No. 2 and said contract No. 1, so that all hydrants so furnished should be constantly supplied with sufficient water at all times for fire purposes, excepting in such sections as it should be absolutely necessary to cut off the same temporarily for repairs or extensions:

That said city should pay said company the sum of fifty dollars ($50.) yearly for each of the first one hundred hydrants furnished, and for the remainder forty dollars ($40.) each yearly, it being understood that the forty hydrants contracted for in said contract No. 1 should be numbered among the first hundred; and that the charge or payment for each hydrant should begin as soon as such hydrant had been ordered and located, and a satisfactory test of its efficiency given to the city council, or to persons by it designated.

That all hydrants should be set up and maintained at the expense of said company; and that they should be set up under the direction of said city or its agents.

That in case said city should determine to discontinue the use of any hydrant, such hydrant should be removed at the expense of said city, the charge and payment therefor thereafter to cease.

That if said city should set up and maintain a lighted fountain, said company should furnish water therefor during the whole of said term, but only during all non-freezing months, without additional expense.

8 That if said city should set up a public drinking fountain, said company should furnish water therefor for the period of one year after the setting up of the same, free of charge.

And that any owners of property in said city who should sustain damage by reason of the failure of said company to fulfill its contract, should have the same right of action and the same remedies against said company as if the contract were made between said company and said property owners. A copy of said contract No. 2,

marked "Exhibit E Contract No. 2," is hereto annexed and made part hereof.

6. And plaintiff says that the promises and provisions of said contract were duly performed by the parties thereunto until the time when the defendant city took possession of the property of the plaintiff company as hereinafter set forth in paragraph 15 of this bill; and that at said time the said city was using one hundred and eighty-one (181) hydrants under said contract No. 2.

7. The plaintiff claims, and avers, upon information and belief, that it was the intent of the legislature to vest in the plaintiff company,—in, by and under said acts of the legislature of general court, and in and by said contracts No. 1 and No. 2, which were made and entered into in pursuance of said acts and within the authority thereof,—the exclusive right of furnishing the inhabitants of said city with pure water for the extinguishment of fires, and for domestic, mechanical and other purposes, and the exclusive right to furnish said city with a supply of water for fire and other purposes, said exclusive rights to exist and continue unless and until the said city should exercise its right under section 7 of chapter 167 of the
9 Acts of 1881 to purchase the corporate property and all the rights and privileges of said company as therein and thereby provided.

8. The plaintiff on information and belief says that on March 3, 1893 the board of aldermen of said city passed the following order, to wit:—

"Ordered, that for the purpose of constructing a system of water works for and within the city of Gloucester and for authority to take, hold and convey through the said city of Gloucester or any part thereof the water of any springs, natural ponds, brooks or other water source (not otherwise granted) this board by and with the consent of the common council petition the general court now in session for an act to supply the city of Gloucester with pure water for the extinguishment of fires and for domestic, mechanical and other purposes; that the city solicitor be instructed to prepare a bill covering all matters essential to a thorough and proper construction of said works and all the details necessary for a proper bill; said bill to be presented to the legislature by said city solicitor on or before the fifteenth day of March, A. D. 1893. That his honor the mayor together with the city solicitor be instructed to appear before the proper committee of the legislature at such time as a hearing may be granted on the aforesaid petition and advocate for and in behalf of the city of Gloucester the passage of the bill to supply the city of Gloucester with pure water."

That the common council of said city concurred in said order of March 7, 1893 and that the same was approved on March 10, 1893 by the mayor of said city; and that in pursuance of such order said board of aldermen presented a petition to the senate and house of representatives composing the legislature or general court of Massachusetts praying for the passage of an act authorizing the city of Gloucester to construct within its borders a system of water works

for the extinguishment of fires and for mechanical, domestic and other purposes, and to take the water of any springs, natural ponds, brooks or other water sources (not otherwise granted) and to hold and convey the same through the said city or any part thereof, in accordance with the draft of a bill to be thereafter submitted
10 in aid of said petition. A copy of said petition marked "Exhibit F" is hereto annexed and made part hereof. Said act, the passage of which was petitioned for as aforesaid, was drawn as provided in said order, and was presented in behalf of said city, and a copy thereof marked "Exhibit G" is hereto annexed and made part hereof.

And the plaintiff says on information and belief that the passage by said legislature of said act a copy whereof is marked "Exhibit G" was advocated in behalf of said city as provided in said order, and was opposed by the plaintiff, and that the said petition and act were referred to the next general court or legislature of the year 1894; and that in the month of January 1894 it was ordered by said common council and said board of aldermen in concurrence that a joint special committee to consist of the mayor of said city, the city solicitor of said city, and such members of the board of aldermen as might be joined be appointed to procure a charter for a municipal water plant for said city, with authority to use all lawful means for the same, and that the city engineer of said city be added to said committee; that thereafter during the session of said legislature of 1894 the plaintiff and defendant herein were both heard by a committee of the said legislature of 1894,—the said defendant city in support of said act and petition in accordance with said last mentioned order, and the plaintiff against the same;—and that said committee reported that the said city have leave to withdraw; and that the said legislature in both branches accepted said report in concurrence; that said joint special committee appointed in accordance with said last mentioned order afterwards reported to the city government of said city, and that thereupon the said city,
11 by its board of aldermen and common council, and by the approval of its mayor, took action as set forth in the city records of said city, voluma 16, 1894, page 314, a copy of which is as follows:

"In Board of Aldermen, Tuesday, *June* 19, 1894.

Water Charter.

From the joint special committee appointed to procure an act authorizing the city to construct and maintain a system of municipal water supply, reporting in detail the expenses attending the work, the employment of counsel, expert engineers in the prosecution of the same, and all matters pertaining to the preparation of the case and the final result, reporting the total expenses $4360.82 and recommending that the contest for our rights be renewed by the city, if necessary, before the next legislature and that this committee be

continued for the purpose of making needful preparations to that end.

Same read, accepted and the recommendation adopted.

Sent down for concurrence.

In common council, June 19, 1894.

Concurred.

Approved June 20, 1894 by Benj. F. Cook, mayor.

From 'City Records,' vol. 16, 1894, page 314."

9. And plaintiff, on information and belief, says that on or about November 8, 1894 the board of aldermen of said city and the city council of said city in concurrence adopted the following orders:—

"Ordered, that his honor the mayor be and he hereby is authorized to petition the general court, at its next session for the passage of a municipal water supply act.

Ordered, also.—That the city solicitor be and he hereby is instructed to draw up a suitable bill to accompany said petition."

And that on November 10, 1894 the same were approved by the mayor of said city. And that on or about November 20, 1894 the said city (by its mayor thereunto duly authorized by said order of the city council) presented a petition to the senate and house of representatives composing the legislature or general court of Massachusetts praying for the passage of an act authorizing said city to acquire
12 and maintain a water supply for the extinguishment of fires, and for mechanical, domestic, and other purposes for the city and its inhabitants, and to acquire therefor the waters of any springs, ponds, lakes, brooks or other water sources, and especially certain sources of supply in the towns of Essex, Wenham and Hamilton; and to supply said town of Essex as well as said city of Gloucester, and to have all rights and privileges necessarily or properly incidental to the subject of said petition; that a copy of said petition marked "Exhibit H" is hereto annexed and made part hereof; that said petition was accompanied by a proposed act drawn by the city solicitor of said city pursuant to said order of November 8, 1894, a copy of which marked "Exhibit I" is hereto annexed and made part hereof;—that on or about January 7, 1895, the board of aldermen of said city and the city council of said city in concurrence adopted an order providing that a joint special committee be appointed consisting of the mayor, the president of the common council, the city solicitor, the city engineer, three members of the board of aldermen, together with such members of the common council as they may join, all of said city, with authority and instructions to use any and all lawful means to procure a charter for a municipal water plant for said city, and that said order was approved by the mayor of said city January 14, 1895; that said petition and act last above mentioned were also referred by the said legislature to a committee thereof, who heard the parties interested therein especially said city, represented as provided in said orders, in favor of said petition and act, and said company, which appeared in opposition thereto. Said committee also reported

that the city have leave to withdraw; but notwithstanding
13 such report and the said opposition of said company, a bill was substituted in the house of representatives of said legislature for said report of the committee; that the bill so substituted was drawn and substituted at the instance of said city by its duly authorized agent or agents, and a copy of the bill so substituted marked "Exhibit J" is hereto annexed and made part hereof; and that, notwithstanding the said efforts of the plaintiff company in opposition to the said petitions and bills of said city and to the said bills presented as aforesaid, said city caused the general court or legislature of Massachusetts to pass the act entitled "An act to supply the city of Gloucester with water," and which constitutes chapter 451 of the Acts and Resolves passed by the general court of Massachusetts in the year 1895 (which act was approved June 4, 1895), and a copy of which act marked "Exhibit K" is hereto annexed and made part hereof.

10. And the plaintiff says that it was provided in section 17 of said act of 1895 (chapter 451) that the said act should be submitted to the qualified voters of said city for its acceptance and should be void unless such voters, voting in their respective wards and precincts at a legal meeting called for that purpose by order of the city council, in the same manner as meetings for municipal elections are called, or at any regular municipal election, should within one year from the passage of said act, determine by ballot by a majority vote by those present and voting thereon to accept the same; and that the warrant for notifying such meeting, if called especially as aforesaid, should specify when the polls should be open for the purpose of voting and when they should
14 be closed. And plaintiff says that by the terms of said act of 1895 (chapter 451) said city was authorized to compete with said company in supplying water to said city and its inhabitants, and was particularly authorized to supply itself,—the said city,—and its inhabitants with water for the extinguishment of fires unless, (as provided in sec. 16 of said act,) said company should notify in writing the mayor of said city within thirty days after said act shall have been accepted by said city as above alleged, that it, the said Gloucester Water Supply Company, "desires to sell to said city all the corporate property and all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all appliances owned by said company, and used in supplying said city and the inhabitants thereof with water," and unless (as provided in said section 16) said company should, within the same time, file with the city clerk of the said city a specification and description thereof. And it was thereupon provided (in the same section) as follows.—

"Said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same and manage and use the property thus conveyed for the purposes and under the provisions of this act."

It was further provided therein that, whenever, within one year

from the passage of said act, said city should by a majority vote of the legal voters of said city, present and voting thereon at a legal meeting called for that purpose by order of the city council, or at any regular municipal election, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said property should thereupon become the property of said city, and said city should pay to said company the fair value thereof, to be ascertained as follows, to wit, that in case said city and said company, after conference thereon, should be unable to agree upon the value of said property, the supreme judicial court of Massachusetts should, upon application of either party and notice to the other, appoint three commissioners, who should determine the fair value of said property, and whose award, when accepted by the court, should be final; and that such value should be estimated without enhancement on account of future earning capacity or future good will, or on account of franchise of said company.

11. And the plaintiff says on information and belief that said City of Gloucester, at a legal meeting duly called for that purpose, and duly held upon the twenty-third day of July 1895, duly voted to accept said chapter 451 of the Acts of 1895.

12. And the plaintiff says that at a meeting of the stockholders of said Gloucester Water Supply Company, duly called for the purpose and duly held at said Gloucester upon the fourteenth day of August 1895, the following vote was duly passed:—

"Whereas, the Gloucester Water Supply Company was incorporated under chapter 167 of the Acts of the Legislature for the Year 1881, for the purpose of furnishing the inhabitants of the city of Gloucester with pure water for the extinguishment of fires, and for domestic, mechanical, and other purposes, with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in said act; and

Whereas, by said act it was provided that the City of Gloucester should have the right at any time during the continuance of the charter of said company, to purchase the corporate property, and all the rights and privileges of said company at such price as might be mutually agreed upon between said company and the City of Gloucester, and that said company should be authorized to make sale of its said property, and all its rights and privileges to said city, and that in case said company and said city should be unable to agree upon the compensation to be paid for the same, such compensation should be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award, when accepted by the court, should be binding upon both parties, and that the authority to said city to purchase said franchise and property of said company, was granted on condition that the same should be assented to by said city by a two-thirds vote of the voters present and voting thereon, at a meeting called for that purpose in the several wards of said city; and

Whereas, it is provided by section 16 of chapter 451 of the Acts of the Legislature of Massachusetts for the Year 1895, that if, within thirty days after said act shall have been accepted by the City of Gloucester, as therein provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester, in writing, that it desires to sell to said city all its corporate property, and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have first purchased of said company the property aforesaid; and

Whereas, the City of Gloucester, at a legal meeting called for that purpose on the twenty-third day of July, 1895, duly voted to accept said act; and

Whereas, the Gloucester Water Supply Company claims that, in the event of the purchase by said city of its franchise and property, said city is liable to pay therefor a just, reasonable and full compensation, and that if said chapter 451 of the Statutes of 1895 undertakes to authorize said city to acquire said franchise and property for less than the just, reasonable and full compensation therefor, such provision is unconstitutional and void;

Now, therefore, in compliance with section 16 of chapter 451 of the Statutes of 1895, it is hereby

Voted, that this company desires to sell to the said City of Gloucester all the corporate property, and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and that David W. Low, the clerk of said company, is hereby authorized and directed to notify the mayor of said city of Gloucester, in writing, that the company so desires to sell said property and franchises, and that David W. Low, clerk of said company, is hereby authorized and directed to sign and file with the city clerk of said city a specification and description of all the property aforesaid."

13. And plaintiff says that upon the fifteenth day of August, 1895, it duly notified the mayor of said city of Gloucester in writing, that it desired to sell to said city all the corporate property, and all the rights, privileges, easements, lands, waters, water
17 rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water, a copy of which notice is hereto annexed marked "Exhibit L" and made part hereof. The copy of the vote referred to in said notice is the same as the copy of the vote above set forth in paragraph numbered 12 of this bill.

14. Plaintiff says that upon said fifteenth day of August 1895 it

duly executed and filed with the city clerk of said city a specification and description of all said property, as provided in section 16 of said chapter 451 of the Acts of 1895, a copy of which specification and description marked "Exhibit M" is hereto annexed and made part hereof.

For convenience said paper is hereinafter called "Said *Specification.*"

15. And the plaintiff says, upon information and belief, that the said city, upon the twenty-fourth day of September 1895, by a majority vote of the legal voters of said city present and voting thereon, at a meeting duly called for that purpose, voted to purchase said property; and that thereafter on the first day of October, A. D. 1895 said city took possession of the same and has since continued to possess, hold, occupy and use the same for the benefit of said city and its inhabitants.

16. And the plaintiff says that said city and the petitioner on or about the twenty-second day of October, 1895, by their duly authorized respective representatives, held a conference for the purpose of endeavoring to agree upon the value of the said
18 property to said Gloucester Water Supply Company, as provided in said section 16 of chapter 451 of the Acts of 1895, but were unable to agree upon the fair value of said property. And that thereafter, to wit, on or about the twenty-ninth day of October, 1895, the plaintiff herein filed a petition in the supreme judicial court for the county of Essex and Commonwealth of Massachusetts praying the court to appoint three commissioners, in accordance with the provisions of said section 16 of chapter 451 of the Acts of 1895, to determine the fair value of said property; and that on or about the twenty-fourth day of September, 1897, said court appointed Everett C. Bumpus, John R. Freeman and John W. Ellis to act as commissioners under said section 16 of chapter 451 of the Acts of the Year 1895.

17. And the plaintiff says that said commissioners heard said company and said city and their respective witnesses and counsel, and on or about the twenty-ninth day of June, 1900, made a report to said supreme judicial court and therein valued, according to their construction of said section 16 of chap. 451 of the Acts of 1895 the said property of the plaintiff; that in said report certain property of the said plaintiff company, consisting of three rights belonging to said company, was not valued by said commissioners, and was not included in the valuation made and reported by them; that said three rights were as follows:

1. The franchise right to take additional sources of supply in ward 8 in said city;

2. The franchise right to lay and maintain pipes in the streets of said city;

19 3. The franchise right to charge water rates for water supplied to said city and its inhabitants.—

That the value of said three rights is, in fact, covered by and in-

cluded in the value and amount of the earnings and income of the plaintiff company.

That in reporting the valuation found by said commissioners and in excluding said three rights from valuation the said commissioners reported as follows.—

"The commissioners appointed under section 16, chapter 451, act of 1895, to appraise the corporate property transferred by the Gloucester Water Supply Company to the City of Gloucester, September 24, 1895, under the provisions of this statute, having heard the parties, respectfully submit this report.

Section 16 directs the commissioners to determine the fair value of all the corporate property of the company, and all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city, and the inhabitants thereof, with water, but that such value shall be estimated without enhancement on account of the future earning capacity, or future good will, or on account of the franchise of said company.

In valuing the property, we have followed the rule adopted by the court in the Newburyport case, 168 Mass. 341, *i. e.*, have found the worth of the physical plant at its cost, less its depreciation, Sept. 24, 1895, the water and water rights as property, and have added a sum as and for a going plant so as to give a fair value for the same. All the personal and other property not physically attached to the water plant has been appraised at a fair value. We have also, with the respondent's consent, valued at what we deemed it worth a contract subsisting Oct. 1, 1895, between the city and the company, to furnish the former with water for its hydrants, for a certain price until Sept. 28, 1896.

In valuing the water and water rights, we have practically followed the Newburyport case, *i. e.*,

1. Valued the water collected in the reservoirs and pond upon the date of the transfer.

2. The water rights of the company, taking into account not only the land, reservoirs, dams, and everything else that created them, but also the quantity and quality of water that gathers at these points, and its adaptability to the purposes for which it was in use when sold. We have valued this right at what we have deemed it fairly worth, taking into account its elevation, proximity, capacity, adaptability, usefulness, and connection with and relation to the plant, and having regard to the fact that we are valuing, not what income this water had yielded or might yield in conjunction with the rest of the property, but the right to have water gather at this place to be used for such purposes.

We heard evidence, against the respondent's objection, upon the worth of the rights, based upon the capitalization or consider-
20 ation of the value (irrespective, as it was claimed, of franchise rights or earning capacity) of the amount of water that could be relied upon to annually collect at these sources. Upon

the conditions existing in this case, we do not think that this evidence should be applied, and excluded the same.

We admitted, against the petitioner's objection, and considered the original cost of the land, which we find to be about $7,327.20, dams and other appurtenances belonging to the water rights, and any improvements and enhancements in, and changes to, the same; also the cost of creating and maintaining a supply of water, like in amount and quality, for use at the distributing plant from two other practical sources, and all evidence bearing upon every other element referred to in the Newburyport Case rule, in order to determine the extent and worth of these property rights. The company paid nothing for its water or water rights independently of the price paid for the land.

We followed the rule also employed in the Newburyport case, as far as the terms of said section 16 permitted 'that the plant was a going concern and in full operation at the time of the transfer—one that had been tested by experience and with which the city could begin the immediate prosecution of the business of supplying water to the established connections for domestic and municipal purposes (including in the latter hydrant service)—and upon an examination of these facts are of opinion that the property had a greater value (for the purposes of its use by the city by reason thereof) than if the plant had not been in full operation, and that this should be considered in passing upon the value of the entire plant.'

The respondent claimed that nothing should be allowed under this rule, as we had allowed all that was contemplated by the statute. We do not think so. We have ascertained the cost of duplication, less depreciation, of the different features of the physical plant, and have treated the water and water rights as already stated, but that to our mind does not represent a fair valuation of this plant, welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby, so that the city in purchasing it, without considering its income or right to do business, but having the power to carry it on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a value that we have found to be seventy-five thousand dollars ($75,000) that has been imported into the plant, which seems to us as much a part of the property valuation as any other part of it.

In appoaching a valuation by this method, we have not considered the past, present or prospective income, good will, or the franchise rights. We have arrived at this conclusion on account of the phrase in section 16, chapter 451, Acts of 1895, that such value shall be estimated without enhancement on account of future earning capacity or future good will, or on account of the franchise of said company, and do not think that in the construction thereof the word 'future' qualifies this conclusion. We have treated it as property which the company can no longer use, but the city can, and is to pay a fair value for upon these conditions.

If, however, the fact of the income which the company was
21 receiving at the transfer is an element that can, under this
statute, be considered as bearing upon the question of a fair valuation, this award, as we respectfully submit, ought to be reformed, and the question of valuation be reconsidered."

* * * * * * *

"Upon consideration of the premises, we determined the fair value of the property transferred by the company to the city Sept. 24, 1895, and which was owned by the company and used in supplying the city and inhabitants thereof with water, as hereinbefore described, to be the sum of six hundred thousand five hundred dollars ($600,500), with interest from Sept. 24, 1895. But if the court shall determine that there had been no valid taking of the water and water rights, but despite this fact the same are to be valued and paid for, upon the principle already stated in this report, *i. e.*, that such defect, if any, can be cured for five hundred dollars, then the said award should be six hundred thousand dollars ($600,000) with interest from Sept. 25, 1895. From the amount of the award, in any event, is to be deducted, as of the time of the transfer, the sum of thirty-nine hundred fifty-five and $\frac{40}{100}$ dollars ($3,955.40), being the amount agreed upon to be so deducted upon an accounting between the city and the company.

This property is subject to an existing mortgage made to secure outstanding bonds to the amount of two hundred and fifty thousand dollars ($250,000), bearing interest at five per cent. per annum, payable Jan. 1, and July 1, and maturing Jan. 1, 1905. If, at the time of the payment of the award, any of these bonds remain outstanding, an amount sufficient shall be retained by the city to indemnify, and save itself harmless for the payment of these bonds when they mature.

We award that the costs shall be twenty-seven thousand dollars, of which the petitioner shall pay five thousand five hundred dollars, and the balance shall be paid by the respondent. Any amount allowed by the court, and paid by the county of Essex, on account of the costs or fees of the commissioners, shall be credited and paid to the respondent.

The petitioner, having paid all of the costs, may recover all but fifty-five hundred dollars from the respondent."

In another portion of said report of said commissioners, in refusing to value the company's franchise right to take additional sources of supply in ward 8, said commissioners reported as follows.—

"There are four other sources of supply in ward eight, and none other in Gloucester so far as it appeared. Of these, Magnolia swamp we deemed to be impracticable for this service; but Haskell's Pond property, whose watershed connects with Dikes reservoir, Fernwood
brook, connecting with Wallace reservoir, and Poll's island,
22 would furnish sufficient portable water as a substitute for the
sources in use by the company in 1895, and as supplementary sources thereto.

The petitioner asked us to take into account and value its interest in these additional sources, inasmuch as its charter of 1881 gave it the right to take them; but as it had not reduced the same into possession or created any property rights to be valued, we declined to do so, as the statute, under which we are acting, prohibits us from considering the franchise rights, which we deemed this claim to be. The failure to take and create property by the exercise of its franchise rights gives nothing that we can appraise under the statute. We, however, permitted the petitioner's experts to take into consideration the effect upon the value, if any, of the water rights owned by the company by the presence of these additional supplies.

We did not, after considering the amount of the available water supply of the company in 1895, enhance the value of its supply on account of the presence of the supplementary sources, but the fact that they could be so employed prevented any impairment under any claim that the company's sources would be shortly exhausted, and therefore likely to be abandoned."

Said commissioners also reported that the respondent requested certain rulings, a copy of which was annexed to said commissioners' report, and the rulings of said commissioners thereon were set forth in Exhibit D annexed to said report. And plaintiff says that amongst the rulings so requested by the respondent,—the said city,—were the following.—

"1. In ascertaining the fair value of the property, it is to be considered as a whole and as a live and going water plant, in connection with takers and in immediate condition to supply water at the time of the transfer, and each part of it is to be valued upon this basis; and when the fair value of the whole property is determined upon this basis, the commissioners are not at liberty to add to such value any further sum by reason of the fact that the company was a live and going water plant, in connection with takers, and in immediate condition to supply water at the time of the transfer, or by reason of either of these facts.

2. The fair value of the property, to be determined by the commissioners, is not its value for the purposes of its use by the city of Gloucester or its inhabitants, but its fair value generally, for any use to which it is adapted as property, not involving the exercise of any public franchise or franchise rights."

And that the rulings of said commissioners in reference to said rulings 1 and 2 respectively were the following marked 1 and 2 respectively.—

23 "1. The rule that we adopted with reference to this matter was as stated in the report, *i. e.*, we ascertained the cost of duplication, less depreciation, of the different features of the physical plant, and valued the water and water rights as stated in the report. This we think does not represent a fair valuation of this property welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby to the property, so that the city in purchasing it, without considering its income or right to do busi-

ness, but having the power to carry it on on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a value we have found to be seventy-five thousand dollars ($75,000), that has been imported into the plant, and seems to us as much a part of the property valuation as any other part of it. We valued the property in its entirety, and included this amount as a part of that valuation.

2. The city of Gloucester having purchased the property as and for a water plant in its entirety, and as that is the use to which it is best adapted, we have valued the same as such, and in doing so have not involved the exercise of any public franchise or franchise right, nor what it was worth to the city or to the petitioner, but what it was fairly worth, having regard to all the facts."

And plaintiff further says that said city claimed before said commissioners that the contract, subsisting Oct. 1, 1895 between said city and said company,—being said contract No. 2,—was not, under said chap. 451 of the Acts of 1895, to be included in the valuation and award to be made under said act; nevertheless said city by its counsel suggested to said commissioners that said contract be valued by them, and accordingly it was so valued; such valuation not, however, appearing separately, but being included in said sum of $600,500.

18. And plaintiff says that both said company and said city objected to said report of commissioners and the award therein made, and that after said report was filed in said supreme judicial court, and before the same was brought before a justice of said supreme judicial court the said company (the plaintiff herein), moved that said award of the commissioners be recommitted with in-
24 structions to receive and consider evidence to prove the earnings of the company for each and every year from the time of its organization until the sale and transfer of the property to the city of Gloucester, and to reform the award as in their judgment may be proper; and that said city also filed a motion or motions a copy of which marked "Exhibit N" is hereto annexed and made part hereof; and that thereafter said report and the award therein and thereby made came on to be heard before a single justice of said supreme judicial court, and that said justice, on July 31, 1900, reserved the case thereon for the consideration of the full court "upon the motions of the parties and the questions of the acceptance or recommittal of the award, it being agreed by the parties that any questions of law raised by either party and appearing in the award by the motions of either party to recommit the award, should be hereby reserved."

That thereafter said report and award of said commissioners and said motions and questions were argued by counsel for both said parties before, and were considered by, said full court; and that thereafter, to wit, on or about June 19th, 1901, said full court by Loring, J., rendered a decision and opinion confirming said report of the commissioners in the exclusion as aforesaid, (*ante*, par. 17)

from valuation of the said rights and earnings and income of plaintiff company.

A copy of said opinion, marked "Exhibit O," is hereto annexed and made part hereof.

19. Plaintiff further says that, in effect, said chap. 451 of the Acts of 1895 threatened said company with municipal competition by said city, and with the loss and ruin which would inevitably result from such municipal competition authorized under said
25 chapter, unless said company should sell and transfer, apparently voluntarily, to said city the said company's property upon the terms of said chapter as construed and applied by said commissioners (*ante*, par. 17) and said full court (*ante*, par. 19); that such sale and transfer and the said acts of the plaintiff,—its officers, agents and stockholders, in reference thereto, (*ante*, par. 12 and par. 13) were influenced and compelled by said threat and were compulsory in fact and in law.

20. Plaintiff further avers and claims that the effect of said chapter 451 of the Acts of 1895 under the circumstances alleged and as construed and applied by said commissioners and by said full court as aforesaid was to violate plaintiff's rights under the Constitution of the United States and that said act of 1895 is unconstitutional and void.

Plaintiff claims that under the above general claim of constitutional rights plaintiff is entitled under this bill without pointing out specific parts of said Constitution, to the protection of every right secured to it thereby; but for convenience plaintiff avers and sets up the following specific claims, reserving, however, the right to the benefit of all plaintiff's other rights under said Constitution in addition to those specifically claimed below.

Plaintiff further avers and claims.—

(*a.*) That said act of 1895, (chap. 451) impaired and impairs the obligation of plaintiff's said contracts (including plaintiff's franchises) and thereby violates section 10 of article 1 of the Constitution of the United States and plaintiff's rights thereunder.

26 (*b.*) That by said legislation, as construed and applied as aforesaid, the State or Commonwealth of Massachusetts deprived and deprives plaintiff of its property without due process of law, in violation of said article 14 of amendments to the Constitution of the United States, and of plaintiff's rights thereunder.

(*c.*) That by said legislation, as construed and applied as aforesaid, the State or Commonwealth of Massachusetts denied and denies to plaintiff and its stockholders the equal protection of the laws, in violation of article 14 of the amendments to the Constitution of the United States, and of plaintiff's rights thereunder.

21. Plaintiff further avers upon information and belief

(*a.*) That the said act of 1895 (chap. 451) was novel; that the only act at all resembling it in the terms of the so-called "sale" was the Massachusetts act of 1894 (chap. 474) the effect and constitutionality of which are still in litigation.—

(*b.*) That it is the policy and practice of the Federal courts not to

pass upon the constitutionality of statutes while there remains an opportunity for the adoption of such construction of the statute involved as would avoid the point or points upon which such constitutionality is questioned.—

(*c.*) That it was open to said full court to hold, as claimed before it by said company that said company was entitled under said act of 1895 (chap. 451) to compensation from said city for all its, the said company's, property except its franchise to be a corporation, and thereby to obviate all questions of constitutionality raised and sought to be raised in, by and under this bill.—

27 (*d.*) That it was not open to the plaintiff company to contend before said commissioners and before said full court that said legislation was unconstitutional;

(*e.*) That by proceeding as aforesaid before said commissioners and said full court plaintiff did not waive its right to contend in the proper court or courts that said legislation violated plaintiff's constitutional rights, but on the contrary, plaintiff says that it has always claimed that if said act of 1895 (chap. 451) should be construed and applied as it has been by said commissioners and by said full court, (as hereinbefore alleged, par. 17 and par. 18) the said act is unconstitutional and void.

(*f.*) That no decree or judgment has yet been entered upon the said award; and no payment thereunder has been made or tendered to plaintiff.

22. Plaintiff shows that, in order to make or tender payment under said award the defendant city will be obliged to issue, under the alleged authority of said chap. 451 (section 6) of the Acts of 1895, bonds, notes, or scrip to the amount of $575,000 and upwards.

23. Plaintiff further shows that this is a suit of a civil nature in equity, and avers that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, to wit, that the same exceeds, exclusive of interest and costs, the sum or value of $900,000.—and arises under the Constitution of the United States.

28 Wherefore, your orator, the plaintiff, prays.—

First. That it may be adjudged and decreed that chap. 451 of the Acts and Resolves passed by the general court of Massachusetts, 1895, as construed as aforesaid by the said full court, is unconstitutional and in violation of the rights secured to your orator, the plaintiff, by and under the Constitution of the United States.

Second. That it may be adjudged and decreed that the defendant has taken and holds the property described in said specification, a copy whereof is marked "Exhibit M," in violation of the rights secured to plaintiff by the Constitution of the United States.

Third. And that your orator may have such relief in the premises as the nature and circumstances of the case shall require, and as to your honors shall seem meet.

To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make, to the best and

utmost of its knowledge, remembrance, information and belief, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto, may it please your honors to grant unto your your orator a *subpœna ad respondendum* issuing out of and under the seal of this honorable court, to be directed to the said defendant, The City of Gloucester, commanding it on a certain day, and under a certain penalty to be therein inserted, to appear before your
29 honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and, further, perform and abide by such further order and decree as to your honors shall seem meet.

And your orator, as in duty bound, will ever pray, etc.

GLOUCESTER WATER SUPPLY CO.,
By GEORGE H. NORMAN, *Treasurer.*

L. L. SCAIFE,
Solicitor for Complainant.
ROBERT M. MORSE,
L. L. SCAIFE,
Of Counsel.

30 UNITED STATES OF AMERICA, }
District of Massachusetts, Suffolk County. }

George H. Norman, being duly sworn, says;—That he is treasurer of The Gloucester Water Supply Company, the complainant in the foregoing bill of complaint, and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others, he believes them to be true.

That in regard to all matters and things in the foregoing bill of complaint alleged, which are not within the personal knowledge of this deponent, the deponent has been fully informed, and believes that the same are true.

GEORGE H. NORMAN.

Sworn to before me twenty-ninth day of June, 1901.
[SEAL.] WILLIAM H. FLEMING,
Notary Public.

31 EXHIBIT A.

Acts and Resolves of Massachusetts, 1881, *Chap.* 167.

"An act to incorporate the Gloucester Water Supply Company.

Be it enacted, etc., as follows:

SECTION 1. Joseph O. Proctor, Robert R. Fears, Samuel A. Stacy, Robert A. Tibbets, Nehemiah D. Cunningham, their associates and

successors, are hereby made a corporation by the name of the Gloucester Water Supply Company, for the purpose of furnishing the inhabitants of Gloucester with pure water for the extinguishment of fires, and for domestic, mechanical and other purposes; with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force, applicable to such corporations.

SECTION 2. Said corporation may for the purposes aforesaid take, hold and convey through the city of Gloucester, or any part thereof, the water of any springs, natural ponds, brooks or other water sources in ward eight of said city, and may take and hold by purchase or otherwise any real estate necessary for the preservation and purity of the same, or for forming any dams or reservoirs to hold the same, and for laying and maintaining aqueducts and pipes for distributing the water so taken and held; and may lay its water pipes through any private lands, with the right to enter upon the same and dig therein for the purpose of making all necessary repairs or service connections; and for the purposes aforesaid may carry its pipes under or over any water course, street, railroad, highway or other way, in such manner as not unnecessarily to obstruct the same; and may, under the direction of the city authorities of Gloucester, enter upon and dig up any road or other way for the purpose of laying or repairing its aqueducts, pipes or other works; and in general may do any other acts and things convenient and proper for carrying out the purposes of this act.

SECTION 3. Said corporation shall, within sixty days after the taking of any land or water rights under the provisions of this act, otherwise than by purchase, file in the registry of deeds for the southern district of the county of Essex a description of any land so taken, sufficiently accurate for identification with a statement of the purposes for which it is so taken, and the title of the land so taken shall vest in said corporation. Any person or corporation injured in property by any acts of said corporation, and failing to agree with said corporation as to the amount of damages, may have the same assessed and determined in the manner provided when land is taken for highways; but no application shall be made to the county
32 commissioners for the assessment of damages for the taking of water rights until the water is actually taken and diverted by said corporation. Any person whose water rights are thus taken or affected may apply as aforesaid within three years from the time the water is actually withdrawn or diverted, and not thereafter; and no suit for injury done under this act shall be brought after three years from the date of the alleged receipt of injury.

SECTION 4. Said corporation may distribute the water through said city of Gloucester, may establish and fix from time to time rates for the use of said water, and collect the same, and make such contracts with the said City of Gloucester, or with individuals, or corporations, to supply water for fire or for other purposes, as may be agreed upon by said city, or individuals, or corporations, and said corporation. The City of Gloucester, by a majority vote of its city

council present and voting jointly thereon, is hereby authorized to contract for a supply of water for fire or other purposes, for a term of years with said Gloucester Water Supply Company; *provided*, the contract is assented to by said city by a majority vote of the voters present and voting thereon at meetings called for that purpose in the several wards of said city.

SECTION 5. The capital stock of said corporation shall not exceed three hundred and fifty thousand dollars and shall be divided into shares of one hundred dollars each; and said corporation may at any time issue bonds to an amount equal to the capital stock actually paid in.

SECTION 6. If any person shall use any of said water taken under this act without the consent of said corporation, or shall wantonly or maliciously divert the water or any part thereof so taken, or corrupt the same, or render it impure, or destroy or injure any dam or aqueduct, pipe, conduit, hydrant, machinery, or other works or property held, owned or used by said corporation, under the authority of and for the purposes of this act, he shall forfeit and pay to said corporation three times the amount of damages assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may be punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECTION 7. The City of Gloucester shall have the right, at any time during the continuance of the charter hereby granted, to purchase the corporate property and all the rights and privileges of said company, at a price which may be mutually agreed upon between said corporation and the said City of Gloucester; and the said corporation is authorized to make sale of the same to said city. In case said corporation and said city are unable to agree, then the compensation to be paid shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party and notice to the other, whose award, when accepted by the court, shall be binding upon both parties. And this authority to purchase said franchise and property is granted on condition that the same
33 is assented to by said city by a two-thirds vote of the voters present and voting thereon at meetings called for that purpose in the several wards of said city.

SECTION 8. For the purposes of defraying the cost of such property, lands, water and water rights as shall be purchased for the purposes aforesaid, the City of Gloucester through its treasurer may from time to time issue notes, bonds, scrip or certificates of debt, to be denominated on the face thereof Gloucester water loan, to any amount not exceeding the amount paid by the city for said purchase, and bearing interest at a rate not exceeding six per centum per annum payable semi-annually, and the principal being payable at periods of not more than thirty years from the issue of said notes, bonds, scrip or certificates of debt, respectively. Said treasurer, under the authority of the city council, may sell such notes, bonds, scrip or certificates of debt, or any part thereof, from time to time, or

pledge the same for any money borrowed for the purposes aforesaid, on such terms and conditions as may be prescribed by the city council, or, in case the city council prescribe no terms and conditions, on such terms and conditions as he may deem proper; and said city shall annually raise by taxation an amount sufficient together with the net income received from rents for the use of said water, to pay the interest on said loans as it accrues; and shall establish at the time of contracting said debt a sinking fund, and contribute thereto from year to year an amount raised by taxation, not exceeding ten thousand dollars in any one year, sufficient with its accumulations to extinguish the debt at maturity; and said sinking fund shall remain inviolate and pledged to the payment of said debt and shall be used for no other purpose.

SECTION 9. In case the City of Gloucester shall purchase the property, rights, privileges and franchises of the corporation established by this act, the said city shall exercise all the rights, powers and authority and be subject to all the restrictions, duties and liabilities herein contained, in such manner and by such officers, servants or agents as said city may direct, and the said city shall be liable to damages for land, water or water rights taken for the purposes set forth in this act which shall not have been previously paid by said corporation.

SECTION 10. This act shall be null and void unless within three years from its passage said corporation shall avail itself of its provisions, and commence a prosecution of the work herein authorized.

SECTION 11. The owners of lands and water rights taken under this act, upon application by either party for an estimate of damages, may require said corporation to give security, satisfactory to the board of aldermen of said city for the payment of all damages and costs which may be awarded to them for the land or other property taken. And if, upon petition of the owner, with notice to the adverse party, the security appears to the aldermen of said city
34 to have become insufficient, they shall require said corporation to give further security to their satisfaction; and all the right or authority of the corporation to enter upon or use said land and other property, except for making surveys, shall be suspended until it gives the security required.

SECTION 12. This act shall take effect upon its passage.

Approved March 31, 1881."

35 EXHIBIT B.

Acts and Resolves of Massachusetts, 1880, *Chap.* 203.

"An act to supply the city of Gloucester with pure water.

Be it enacted, &c., as follows:

SECTION 1. The City of Gloucester is hereby authorized to take, hold and convey into and through said city or any part thereof, the

waters of any springs, natural ponds, brooks or other water sources within its own limits, for the use of said city and the inhabitants thereof, for the extinguishment of fires, creating steam, domestic and other purposes; and may also take and hold, by purchase or otherwise, lands, or estates for the construction of such works as may be necessary therefor; and for laying and maintaining aqueducts or pipes, constructing and maintaining reservoirs or canals, and such other works as may be deemed necessary or proper for conveying, raising, forcing, retaining, distributing or disposing of said water.

SECTION 2. The mayor of said city of Gloucester shall, within sixty days after taking any of the land aforesaid, file in the registry of deeds for the county of Essex, southern district, a description thereof sufficiently accurate for identification.

SECTION 3. Said city for the purposes aforesaid may build aqueducts and maintain the same by any works suitable therefor; may provide and maintain suitable machinery for raising the water above the source of supply; may erect such structures as are necessary for preserving the works; may make and maintain suitable dams and reservoirs, and establish such public fountains and hydrants as are at any time deemed proper, and may change or discontinue the same; may distribute the water throughout said city, regulate its use and establish the rates to be paid therefor. Said city may also for the purposes aforesaid carry its pipes and other works over or under any water course, street, railroad or highway, in such manner as not to obstruct the same; and may do any other acts and things necessary and proper in executing the purposes of this act.

SECTION 4. Said city shall be liable to pay all damages sustained by any person or corporation by taking any land, water, water rights, or property, or by the constructing of any aqueduct, reservoir, or other works for the purposes aforesaid; and if any person or corporation sustaining damages as aforesaid cannot agree with the city upon the amount of said damages, he or it may have them assessed in the same manner as is provided by law with respect to land taken for highways.

36 SECTION 5. For the purpose of defraying the expenses which may be incurred by the city of Gloucester in carrying into effect the powers granted by this act, the city council shall have authority to issue from time to time, notes, scrip, bonds or certificates of debt, to be denominated on the face thereof 'City of Gloucester water loan,' to an amount not exceeding three hundred thousand dollars; the same to bear interest not exceeding the rate of six per cent. per annum, and the principal to be payable at periods not more than thirty years from the issuing of said notes, scrip, bonds or certificates of debt respectively; and the city council may sell the same or any part thereof, from time to time, at public auction or private sale, or pledge the same for money borrowed for the purposes of this act, on such terms and conditions as the city council shall judge proper. The net surplus income and receipts shall be set apart as a sinking fund and applied solely to the payment of the

principal of said loan. The mayor, city treasurer and president of the common council for the time being, shall be trustees of said fund, and shall whenever required by the city council render an account of all their doings in relation thereto. And the city council of said city is hereby authorized, from time to time, to appropriate, grant and assess such sum or sums of money as shall be deemed expedient toward paying the principal of the money so borrowed or obtained, and the interest thereof, in the same manner as money is appropriated, granted and assessed for other city purposes.

SECTION 6. The rights, powers and privileges hereby granted may be exercised by such officers, agents and servants as said city may select or employ, who shall be subject to such ordinances, rules and regulations as the city council may establish, and the mayor shall be eligible to such office.

SECTION 7. If any person shall use any of the said water without the consent of said city, or shall wantonly or maliciously divert the water or any part thereof, of the ponds, springs, streams or sources of water taken or held by said city, pursuant to the provisions of this act, or corrupt the same; or render it impure, or destroy or injure any dam, aqueduct, pipe, conduit, hydrant, machinery or other works or property held, owned or used by said city under the authority and for the purposes of this act, he shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may also be punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECTION 8. This act shall take effect upon its passage, and shall become void unless accepted by two-thirds of the legal voters of the city of Gloucester, present and voting thereon, at a legal meeting which shall be called in their several ward rooms for that purpose by the mayor and aldermen of said city, within six months from the passage of this act, at which meeting the check list shall be used.

Approved April 17, 1880."

37 EXHIBIT C.

Form of Water Contract.

Adopted by city council Sept. 28th, 1886.

Ratified Oct. 19, 1886. 883 yes, 205 no.

This indenture, made and concluded this twenty-eighth day of September, A. D. 1886, by and between the Gloucester Water Supply Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, of the first part, and the City of Gloucester, a municipal corporation existing under the laws of said Commonwealth, of the second part

Witnesseth, that whereas, said company, the party of the first part, has constructed works and laid pipes, through which from a reservoir on "Bond's hill" so called, in said city, it has introduced water into the streets of said city, and whereas the said city, the party of the second part, is desirous that its citizens should have the best possible protection against fire,—

Now know all men by these presents, that said Gloucester Water Supply Company, the party of the first part, agrees with said City of Gloucester, the party of the second part, as follows, viz.—

That said company shall furnish said city water for fire purposes for a period of ten years, as hereinafter provided, unless sooner terminated by the purchase of said company's property and franchises by said city, in accordance with section seven of chapter one hundred and sixty-seven of the Acts of the Year Eighteen hundred and eighty-one of said Commonwealth.

38 And that said company will furnish for the purpose aforesaid to said city and set forty first class three-nozzle post fire hydrants, such as the city council may determine, all to be connected with the main pipes and supplied with water therefrom, the connecting pipe in every case to be not less than five inches in diameter; such hydrant or hydrants to be placed in such localities and streets as may be selected by the city council of said city or by such committees or agents as said city council may appoint.

Also that said company will maintain at all times an ample supply of water in its reservoir aforesaid on "Bond's hill" and conduct therefrom a supply of water of the full capacity of the main pipes to and for all hydrants furnished under this agreement, so that all hydrants so furnished shall be constantly supplied with sufficient water at all times for fire purposes excepting in such sections as it may be absolutely necessary to cut off the same temporarily for repairs or extensions, and then the supply of water shall be so cut off only during the continuance of such necessity, and after due notice to the chief engineer of the fire department of said city, or in case of his death, absence or inability to the officer supplying his place.

And in consideration of the party of the first part performing faithfully each and all of its agreements herein contained, the party of the second part will pay to said party of the first part in semi-annual payments the sum of sixty dollars ($60) yearly for each and every hydrant set by said company for said city as aforesaid and for

39 the use of water therefrom, and said sums so reckoned shall be in full payment and satisfaction for the use of said company's water and hydrants by said city, and for the performance by said company of each and all of said company's agreements herein contained; and it is agreed that said term of years shall begin at soon as the hydrant or hydrants ordered and located are set and a test of the efficiency of the same and the water supply is given satisfactory to the city council of said city or to persons by it designated. The location of each hydrant shall be made and ordered by the party of the second part previous to the setting thereof by the

party of the first part, who shall proceed to set them as fast as they are ordered and located.

It is further agreed that in case said city shall during the existence of this contract locate one hundred hydrants, the cost thereof thereafter to said city, being the amount to be paid said company as aforesaid, shall not exceed the sum of fifty dollars ($50) yearly for each hydrant.

It is further agreed that said party of the second part shall on all reasonalbe occasions have the right to use any hydrants furnished under this contract for the purpose of testing the same or the fire apparatus owned or used by said city without any unnecessary waste of water or power and without extra charge therefor.

All hydrants are to be furnished and set by and at the expense of said company, under the direction of said city or its agents, and said company further agrees that it will keep and maintain said hydrants in good order and repair at all times for the use of said city during the said period.

40 It is also agreed that in case the party of the second part shall determine to discontinue the use of any hydrant which may be located under this contract, such hydrant shall be removed at the expense of said city, the charge or payment therefor thereafter to cease.

And inasmuch as the purpose of this contract in providing for a supply of water for the extinguishment of fire is the protection of the property of individuals as well as of the municipality, and as the payments to be made under this contract are to be raised in part or wholly by taxation upon such property, it is expressly understood and agreed by and between the parties hereto that the said party of the second part acts herein not only as the representative of the municipality, but in behalf of the individual property owners in said city, and that any owner of property in the said city who shall sustain damage by reason of the failure of the party of the first part to fulfil the terms of this contract which are to be observed and performed by said party of the first part (unless said failure is caused by act of God or unavoidable casualty) shall have the same right of action and the same remedies against said company as if said contract were made by and between said party of the first part and said property owner in his own name.

Provided, however, that this contract shall be of no force and effect until the same has been assented to by said city by a majority vote of all the voters thereof present and voting thereon at a legal meeting called for that purpose as provided in section four of chapter one hundred and sixty-seven of the Acts of the Year Eighteen hundred and eighty-one.

41 In witness whereof, the said City of Gloucester, by its mayor hereto duly authorized, and the Gloucester Water Supply Company by its treasurer thereto duly authorized, have caused these presents to be subscribed in their names and behalf, and the said

company has caused the same to be countersigned by its president the day and year first above written.

(Signed) GLOUCESTER WATER SUPPLY COMPANY,
By Its Treasurer, Duly Authorized.
G. NORMAN WEAVER. [SEAL.]
J. O. PROCTOR, *President.*

(") CITY OF GLOUCESTER,
By Its Mayor.

42 EXHIBIT D.

Acts and Resolves of Massachusetts, 1887, *Chapter* 288.

An act to amend the charter of the Gloucester Water Supply Company.

Be it enacted, etc., as follows:

SECTION 1. Section four of chapter one hundred and sixty-seven of the Acts of the Year Eighteen hundred and eighty-one is hereby amended by adding at the end of said section the following words.— or at any regular municipal election; and the warrant for notifying such meetings if called specially as aforesaid shall specify when the polls shall be opened for the purpose of voting and when they shall be closed.

SECTION 2. This act shall take effect upon its passage.

Approved May 19, 1887.

43 EXHIBIT E.

Contract No. 2.

Form of Contract.

Between the Gloucester Water Supply Company and the City of Gloucester; accepted by the city council July 12, 1887, subject to ratification of the people on Tuesday, August 9th, 1887, and ratified 387 to 240.

This indenture, made and concluded this fifteenth day of July, 1887, by and between the Gloucester Water Supply Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, of the first part, and the City of Gloucester, a municipal corporation existing under the laws of said Commonwealth, of the second part, witnesseth.—

That whereas said company, the party of the first part, has constructed works and laid pipes, through which, from a reservoir on "Bond's hill" so called, in said city, it has introduced water into

the streets of said city, and whereas the said city, the party of the second part, is desirous that its citizens should have the best possible protection against fire, and to that end, desirous that the former contract between the parties be expanded and enlarged.

Now, therefore, know all men by these presents, that said Gloucester Water Supply Company, the party of the first part, agrees with said City of Gloucester, the party of the second part, as follows, viz.—

The said company will furnish said city of Gloucester
44 water for fire purposes for the balance of the period of ten years, already agreed upon by indenture between said parties, dated the twenty-eighth day of September, eighteen hundred and eighty-six, as hereinafter provided, unless sooner terminated by the purchase of said company's property and franchises by said city, in accordances with section seven of chapter one hundred and sixty-seven of the Acts of the Year Eighteen hundred and eighty-one of said Commonwealth.

And that said company will furnish during said period for the purpose aforesaid to said city, and set and maintain one hundred first-class three-nozzle post fire hydrants, such as the city council may determine, in addition to the forty hydrants already contracted for by said former indenture, which shall also be maintained in accordance with the terms of this present indenture, all to be connected with the main pipes and supplied with water therefrom, the connecting pipe in every case to be not less than five inches in diameter; such hydrants or any hydrant set under the former contract to be placed in such localities and streets as may be selected by the city council of said city, or by such committee or agents as said city council may appoint.

Also that said company will maintain at all times an ample supply of water in its reservoir aforesaid on "Bond's hill" and conduct therefrom a supply of water of the full capacity of the main pipes to and from all hydrants furnished under this or the former agreement, between the parties hereto so that all hydrants so furnished shall be constantly supplied with sufficient water at all times for fire

purposes, excepting in such sections as it may be absolutely
45 necessary to cut off the same temporarily for repairs or extensions, and then the supply of water shall be cut off the same temporarily for repairs or extensions, and then the supply of water shall be cut off only during the continuance of such necessity and after due notice to the chief engineer of the fire department of said city, or in case of his death, absence or inability, to the officer supplying his place.

And in consideration of the party of the first part performing faithfully each and all of its agreements herein contained, the party of the second part will pay to said party of the first part in semi-annual payments, the sum of fifty dollars ($50) yearly, for each and every hydrant set by said company for said city as aforesaid, whether under this or the former agreement between said parties, and for the use of water from all such hydrants, until the number of hydrants

located and set in manner herein specified shall exceed one hundred, including the forty contracted for by said former indenture, and thereafter the amount to be paid by said city for each hydrant in excess of said one hundred, and for the use of water therefrom as herein specified, shall be at the rate of forty dollars ($40) yearly; and said sums so reckoned shall be in full payment and satisfaction for the use of said company's water and hydrants by said city, and for the performance by said company of each and all of said company's agreements herein contained; and it is agreed that said term of years shall be reckoned as in the former indenture, dated September twenty-eighth, eighteen hundred and eighty-six, and that the charge or payment for each hydrant to be set as aforesaid, shall begin as soon as such hydrant has been ordered by the city council or its agents, and a test of the efficiency of the same and the
46 water supply is given satisfactory to the city council of said city, or to persons by it designated.

The location of each hydrant shall be made and ordered by the party of the second part previous to the setting thereof by the party of the first part, who shall proceed to set them as fast as they are ordered and located.

It is further agreed that said party of the second part shall, on all reasonable occasions, have the right to use any hydrant furnished under this or the former contract, for the purpose of testing the same, or the fire apparatus owned or used by said city, without any unnecessary waste of water or power, and without extra charge therefor.

All hydrants are to be furnished and set by and at the expense of said company under the direction of said city or its agents, and said company further agrees that it will keep and maintain said hydrants, and all hydrants furnished said city as aforesaid, whether under this or the former contract between the parties in good order and repair at all times, for the use of said city during the said period.

It is also agreed, that in case the party of the second part shall determine to discontinue the use of any hydrant which may be located under this or the former contract by indenture of September twenty-eighth, eighteen hundred and eighty-six, such hydrants shall be removed at the expense of said city, the charge or payment therefor thereafter to cease.

It is further agreed, that if at any time during the term of years of said contract said city shall purchase or otherwise obtain,
47 set and maintain a suitable lighted fountain apparatus, within the limits of said city in such place as the city council shall determine, said water company will on its part provide water to supply the same during the whole of said term of years, but only during all non-freezing months, free of charge and without additional expense.

It is further agreed between the parties hereto, that if said city shall, during the existence of this agreement, set a public drinking fountain (with suitable arrangements for cooling water) within the limits of said city, in such place as the city council may determine,

the said company will, immediately upon the setting of such fountain, with suitable arrangements for cooling water, furnish all the water that may be needed therefor free of charge for the period of one year from the setting thereof.

And, inasmuch as the purpose of this contract in providing for a supply of water for the extinguishment of fire, is for the protection of the property of individuals as well as of the municipality, and as the payments to be made under this contract are to be raised in part or wholly by taxation upon such property, it is expressly understood and agreed by and between the parties hereto, that the party of the second part acts herein, not only as the representative of the municipality, but in behalf of the individual property owners in said city, and that any owners of property in the said city who shall sustain damage by reason of the failure of the party of the first part to fulfill the terms of this contract which are to be observed and performed by said party of the first part (unless said failure is
48 caused by act of God or unavoidable casualty,) shall have the same right of action and the same remedies against said company as if said contract were made by and between said party of the first part and the said property owner in his own name.

It is agreed, that the contract between the parties hereto, dated September twenty-eighth, eighteen hundred and eighty-six, shall, upon the execution of this contract and its ratification by vote as hereinafter set forth, be thereupon and thereby annulled, that except where express reference is herein had to said contract by indenture dated the twenty-eighth day of September, eighteen hundred and eighty-six, said last named contract may be used for the purpose of explaining this instrument; but nothing herein contained shall be construed to mean that said water company shall be released from its obligation, already incurred in regard to the forty hydrants heretofore contracted for by said city, but the same shall be furnished and maintained by said water company, in accordance with the terms of this indenture, the rate or charge for such hydrants being altered agreeably thereto.

Provided however, that this contract shall be of no force and effect until the same has been assented to by said city by a majority vote of all the voters thereof present and voting thereon at a legal meeting called for that purpose as provided in section four of chapter one hundred and sixty-seven of the acts of the year eighteen hundred and eighty-one and amendments thereof.

In witness whereof, the said City of Gloucester, by its mayor hereto duly authorized, and the Gloucester Water Supply Company by its treasurer thereto duly authorized, have caused these
49 presents to be subscribed in their names and behalf by and their respective corporate seals to be hereto affixed, and the

said company has caused the same to be countersigned by its president, the day and year first above written.

[SEAL] (Signed) CITY OF GLOUCESTER,
By DAVID I. ROBINSON,
Mayor of City of Gloucester.

[SEAL.] " G. NORMAN WEAVER,
Treasurer Gloucester Water Supply Co.

" JOSEPH O. PROCTOR,
President of Gloucester Water Supply Co.

50 EXHIBIT F.

GLOUCESTER, *March 3d*, 1893.

To the honorable the senate and house of representatives.

GENTLEMEN: The undersigned members of the board of aldermen of the city of Gloucester, respectfully petition your honorable body for the passage of an act authorizing the City of Gloucester to construct within its borders a system of water works for the extinguishment of fires, and for mechanical, domestic and other purposes, and to take the water of any springs, natural ponds, brooks or other water source (not otherwise granted) and to hold and convey the same through the said city of Gloucester or any part thereof, in accordance with the draft of a bill to be hereafter submitted in aid of this petition.

(Signed) JAMES W. THOMAS,
" WM. F. MOORE,
" HENRY S. McCULLOCH,
" HENRY P. DENNEN,
" B. FRANK ELLERY,
" G. H. MORTON,
Board of Aldermen, City of Gloucester, Mass.

51

Exhibit G.

House No. 625.

House of Representatives, *March* 13, 1893.

(Bill accompanying the petition of the board of aldermen of Gloucester, that said city may be authorized to construct a system of water supply for said city for fire, domestic and manufacturing purposes.)

Commonwealth of Massachusetts.

In the year one thousand eight hundred and ninety-four.

An act to supply the city of Gloucester with pure water.

Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same, as follows:

Section 1. The City of Gloucester may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes, and may establish fountains and hydrants, relocate or discontinue the same, may regulate the use of such water and fix and collect rates to be paid for the use of the same.

Section 2. The said city for the purpose aforesaid, may take by purchase or otherwise and hold the waters of any pond, stream, spring or wells within the limits of said city, also Chebacco lake in the towns of Essex, Wenham and Hamilton, and the water rights connected therewith, and obtain and take water by means of bored, driven, artesian or other wells on any land within said city, and hold and convey said water through said city and through said towns of Essex, Wenham and Hamilton from said lake, and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding and preserving such water, and for conveying the same to any part of said city of
52 Gloucester; and may erect on the lands thus taken or held, proper dams, buildings, fixtures and other structures, and may make excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands, and under the direction of the board of selectmen of any town in which said ways are situated, may enter upon and dig up any such ways

in such manner as to cause the least hindrance to public travel on such ways.

The title to all land within said city of Gloucester, taken or purchased under the provisions of this act, shall vest in said city, and the land taken may be managed, improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interests of said city.

SECTION 3. Said city shall, within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the southern district for said county of Essex, a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECTION 4. Said city shall pay all damages sustained by any person or corporation in property, by the taking of any lands, right of way, water, water sources, water rights or easements, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways on application at any time within the period of two years from the taking of such land or other property or the doing of other injury under the authority of this act; but no such application shall be made after the expiration of said two years. No application for the assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

SECTION 5. In every case of a petition to the superior court for an assessment of damages, the city may tender to the complainant or his attorney any sum or may bring the same into court to be paid to the complainant for the damages by him sustained or claimed in his petition, or may in writing offer to be defaulted and that
53 damages may be awarded against it for the sum therein expressed and if the complainant does not accept such sum, with his costs up to that time, but proceeds in his suit, and does not recover greater damages than were so offered or tendered, not including interest on the sum recovered in damages, from the date of such offer or tender, the city shall have judgment for its costs, after said date for which execution shall issue, and the complainant, if he recovers damages shall be allowed his costs only to the date of such offer or tender.

SECTION 6. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount not exceeding in the aggregate, four hundred thousand dollars; such bonds, notes or scrip shall bear on their face the words "City of Gloucester water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear

interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purpose of this act upon such terms and conditions as it may deem proper; *Provided*, That such securities shall not be sold for less than the par value thereof. The said city shall provide, at the time of contracting said loan, for the establishment of a sinking fund and shall annually contribute to such fund a sum sufficient, with the accumulations thereof, to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose.

SECTION 7. The said city, instead of establishing a sinking fund, may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed, the amount required thereby shall, without further vote, be assessed by the assessors of said city in each year thereafter until the debt incurred by said loan shall be extinguished, in the same manner as other taxes are assessed under the provisions of section thirty-four of chapter eleven of the Public Statutes.

SECTION 8. The return required by section ninety-one of chapter eleven of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the preceding section and the amounts raised and applied thereunder for the current year.

SECTION 9. The said city shall raise annually by taxation a sum which, with the income derived from water rates will be sufficient to pay the current annual expenses of operating its water works, and the interest as it accrues on the notes, bonds and scrip issued as aforesaid by said city, and to make such contributions to
54 the sinking fund and payments on the principal as may be required under the provisions of this act.

SECTION 10. Whoever shall use any water taken under this act without the consent of said city or shall wilfully or wantonly corrupt, pollute or divert any of the waters taken or held by said city pursuant to the provisions of this act, or destroy or injure any structure, work or other property owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort, and upon conviction of either of the above wilful or wanton acts shall also be punished by a fine not exceeding three hundred dollars or by imprisonment not exceeding one year.

SECTION 11. The occupant of any tenement shall be liable for the payment of the rent for the use of water in such tenement, and the owner shall also be liable in case of the non-payment by the occu-

pant, for all sums due for the use of water under this act, to be collected in an action of contract in the name of the City of Gloucester.

SECTION 12. The powers and duties granted to and imposed upon the City of Gloucester by this act shall be exercised by a board of water commissioners, consisting of five residents of the city, to be appointed by the mayor with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval for the terms of one, two, three, four and five years respectively, from the first Monday of February next following their appointment, and thereafter one commissioner shall be appointed each year, for the term of five years from the first Monday of February; all such commissioners, except in case of removal, shall hold office until their successors are appointed in their stead; vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds at the time any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council for any cause which shall be deemed sufficient and shall be expressed in the vote of removal. The commissioners shall receive such compensation for their services as the city council, by a two-thirds — of each branch thereof, shall determine.

SECTION 13. The said commissioners shall superintend and direct the construction, execution and performance of all the works, matters and things mentioned in the preceding sections; they shall be subject to such ordinances, rules and regulations in the execution of such duties as the city council may from time to time ordain and establish, not inconsistent with the provisions of this act and the laws of this Commonwealth. Said water commissioners shall make all contracts for the above purpose in the name and behalf of the city, but no contract shall be made by them which involves the expenditure of money not already appropriated for the purpose by the city council of said Gloucester. A majority of said commissioners shall be a quorum for the exercise of the powers and the performance of the duties of the commission.

SECTION 14. The water commissioners shall fix such prices or rents for the use of water, as shall produce annually as near as may be a net surplus equal to two per centum of the total amount of the bonds, notes or scrip, issued under this act, after paying all current expenses of operating the water works, and interest upon loans, and after payment of all expense for new construction, not exceeding ten thousand dollars in any one year.

The commissioners of sinking funds of the city of Gloucester shall be trustees of the sinking fund which shall be set apart for the payment and redemption of said water loan and which shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid, shall be paid into the sinking fund, and if said surplus does not equal two per centum of the total amount of the bonds, note and scrip issued under this act, the city shall raise by general taxation a sum which, with the

surplus shall equal said two per centum, and shall contribute said sum to the sinking fund.

Said commissioners shall annually and as often as the city council may require, render an account of all their doings in relation to the sinking fund and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECTION 15. This act shall be submitted to the qualified voters of the city of Gloucester for its acceptance and shall be void unless such voters, voting in their respective wards and precinct at a legal meeting called by order of the city council, in the same manner as meetings for municipal elections are called, shall within three years from the passage of this act, determine by ballot, by a two-thirds — of those present and voting, to accept the same.

SECTION 16. So much of this act as authorizes the submission of the question of its acceptance to the legal voters of said city, shall take effect upon its passage, but it shall not take further effect unless and until accepted, as hereinbefore provided, by the qualified voters of said city, and the number of meetings called for the purpose of this acceptance shall not exceed three in any one year.

56

EXHIBIT H.

GLOUCESTER, MASS., *November* 20, 1894.

To the honorable the senate and house of representatives in general court assembled:

The undersigned, mayor of the city of Gloucester, by order of the city council, respectfully petitions your honorable body for the passage of an act, authorizing the City of Gloucester to acquire and maintain a water supply for the extinguishment of fires, and for mechanical, domestic and other purposes for the city and its inhabitants, and to acquire therefor the waters of any springs, ponds, lakes, brooks, or other water sources, and especially of the Chebacco lakes in the towns of Essex, Wenham and Hamilton, and to hold and convey the same into and through said towns of Essex, Wenham and Hamilton, supplying said town of Essex and its inhabitants with water, if desired, and into and throughout the city of Gloucester, or any part thereof, and for all rights and privileges necessarily or properly incidental to the subject of this petition.

(Signed) BENJ. F. COOK,
Mayor of the City of Gloucester.

57 EXHIBIT I.

House No. 380.

(Bill accompanying petition of the mayor of Gloucester. Water supply.)

COMMONWEALTH OF MASSACHUSETTS.

In the year one thousand eight hundred and ninety-five.

An act to supply the city of Gloucester with pure water.

Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same, as follows.—

SECTION 1. The City of Gloucester may supply itself and its inhabitants with water for the extinguishment of fires, and for domestic, manufacturing and other purposes; and may establish fountains and hydrants, relocate or discontinue the same, may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECTION 2. The said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells not heretofore taken or purchased by the Gloucester Water Supply Company, within the limits of said city, also the Chebacco lakes in the towns of Essex, Wenham and Hamilton, and the waters which flow into the same and the water rights connected therewith, and obtain and take water by means of bored, driven, artesian or other wells on any land within said city, and hold and convey said water through said city and through said towns of Essex, Wenham and Hamilton from said lakes, and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding, storing, purifying and preserving such water and for conveying the same to any part of said city of Gloucester; and may erect, on the lands thus taken or held, proper dams, reservoirs, buildings, fixtures and other structures, and may make excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and

58 may construct and lay down conduits, pipes and other works, under or over any lands, water-courses, railroads, or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of any town in which said ways are situated, may enter upon and dig

up any such ways in such manner as to cause the least hindrance to public travel on such ways.

The title to all land taken or purchased under the provisions of this act shall vest in said city, and the land so taken may be managed, improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interests of said city.

SECTION 3. Said city shall within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the southern district for said county of Essex a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECTION 4. Said city shall pay all damages sustained by any person or corporation in property by the taking of any lands, right of way, water, water sources, water rights or easement, or by any other thing done by said city under the authority of this act, except that said city shall not be liable to pay any damage resulting from taking water from the said Chebacco lakes other than the Commonwealth itself would be legally liable to pay. Any person or corporation sustaining damages as aforesaid under this act who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on making application at any time within the period of two years from the taking of such land or other property, or the doing of other injury, under the authority of this act; but no such application shall be made after the expiration of said two years. No application for the assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

Said city shall pay all damages sustained under the authority of this act by the town of Essex in its alewife fishery, which, unless agreed upon, shall be assessed and determined in the manner hereinbefore provided; *provided, however*, that said city may construct and maintain suitable fishways for the preservation of said alewife fishery.

SECTION 5. In every case of a petition to the superior court for an assessment of damages the city may tender to the complainant or his attorney any sum, or may bring the same into court to be paid
to the complainant for the damages by him sustained or
59 claimed in his petition, or may in writing offer to be defaulted
and that damages may be awarded against it for the sum therein expressed, and if the complainant does not accept such sum, with his costs up to that time, but proceeds in his suit, and does not recover greater damages than were so offered or tendered, not including interest on the sum recovered in damages from the date of such offer or tender, the city shall have judgment for its costs after said date for which execution shall issue, and the complainant, if he

recovers damages, shall be allowed his costs only to the date of such offer or tender.

SECTION 6. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount sufficient for such purpose, to be determined by the board of water commissioners hereinafter provided for; such bonds, notes or scrip shall bear on their face the words "City of Gloucester water loan," and shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest, payable semi-annually, at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city, and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, and upon such terms and conditions as it may deem proper; *provided*, that such securities shall not be sold for less than the par value thereof. The said city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECTION 7. The said city instead of establishing a sinking fund, may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall without further vote be assessed by the assessors of said city in each year thereafter until the debt incurred by said loan shall be extinguished, in the same manner as other taxes are assessed under the provisions of section thirty-four of chapter eleven of the Public Statutes.

SECTION 8. The return required by section ninety-one of chapter eleven of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the preceding section, and the amounts raised and applied thereunder for the current year.

SECTION 9. The said city shall raise annually by taxation a sum which, with the income derived from water rates, will be sufficient to pay the current annual expenses of operating its water works, and the interest as it accrues on the notes, bonds, and scrip issued as aforesaid by said city, and such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECTION 10. Whoever shall use any water taken under this act without the consent of said city, or shall wilfully or wantonly corrupt, pollute or divert any of the waters taken or held by said city pursuant to the provisions of this act, or destroy or injure any structure, work or other property owned, held or used by said city

under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall also be punished by a fine not exceeding three hundred dollars or by imprisonment not exceeding one year.

SECTION 11. The occupant of any tenement shall be liable for the payment of the rent for the use of water in such tenement, and the owner shall also be liable, in case of non-payment by the occupant, for all sums due for the use of water under this act, to be collected in an action of contract in the name of the City of Gloucester.

SECTION 12. The powers and duties granted — and imposed upon the City of Gloucester by this act, including the purchase or taking of any lands or other property or rights, shall be exercised by a board of water commissioners, consisting of three residents of the city, to be appointed by the mayor, with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval, for the terms of one, two and three years, respectively, from the first Monday of February next following their appointment, and thereafter one commissioner shall be appointed each year for the term of three years from the first Monday in February; all such commissioners, except in case of removal, shall hold office until their successors are appointed in their stead; vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds at the time any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council for any cause which shall be deemed sufficient and shall be expressed in the vote of removal. The commissioners shall receive such compensation for their services as the city council, by a two-thirds vote of each branch thereof, shall determine.

SECTION 13. The said commissioners shall superintend and direct the construction, execution and performance of all the works, matters and things mentioned in the preceding sections; they shall be subject to such ordinances, rules and regulations in the execution of such duties as the city council may from time to time ordain and establish, not inconsistent with the provisions of this act and the laws of this Commonwealth. Said water commissioners shall
61 make all contracts for the above purpose in the name and behalf of the city, but no contracts shall be made by them which involves the expenditure of money not already appropriated for the purpose by the city council of said Gloucester. A majority of said commissioners shall be a quorum for the exercise of the powers and the performance of the duties of the commission.

SECTION 14. The water commissioners shall fix such prices or rents for the use of water as shall produce annually as near as may be a net surplus over operating expenses and interest charges equal to two per centum of the total amount of the bonds, notes or scrip issued under this act, after paying all current expenses of operating the water

works and interest upon loans, and after payment of all expense for new construction not exceeding ten thousand dollars in any one year after the original construction.

The commissioners of sinking funds of the city of Gloucester shall be trustees of the sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid shall be paid into the sinking fund, if any is established hereunder, and if said surplus does not equal two per centum of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which, with the surplus, shall equal said two per centum, and shall contribute said sum to the sinking fund.

Said commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECTION 15. The said town of Essex may connect water pipes with the main pipe of the city of Gloucester in said town, such connection to be made to the satisfaction and approval of the engineer of said city, and in such case said city shall furnish to the inhabitants of said town through the pipes so connected a supply of water for the extinguishment of fires and for domestic and other purposes, for which said town of Essex shall pay said city an equitable compensation, which, in case of disagreement, shall be determined by three commissioners to be appointed by the supreme judicial court upon application of either party and notice to the other, whose award, when accepted by said court, shall be binding upon the parties for the term of five years. And nothing in this act shall be construed to prevent the said towns of Essex, Wenham and Hamilton from supplying themselves with water from the said Chebacco lakes for fire, domestic and other purposes.

SECTION 16. If within thirty days after this act shall have been accepted by the City of Gloucester as hereinafter provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester in writing that it desires to sell to said city all the rights privileges, easements, lands, waters, water-rights, dams, reser-
62 voirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city and said city is authorized to purchase the same, and manage and use the property thus conveyed for the purposes and under the provisions of this act. Whenever said city

shall by a majority vote of the legal voters of said city, present and voting thereon at a legal meeting called for that purpose, by order of the city council, or at any regular municipal election, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said property shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided.

In case the said city and the said company, after conference thereon, shall be unable to agree upon the value of said property the supreme judicial court shall, upon application of either party, and notice to the other, appoint three commissioners, one of whom shall be learned in the law and one a skilled engineer, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, unless application shall be made for a jury as hereinafter provided, shall be final when accepted by the court. Such value shall be estimated without enhancement on account of future earning capacity, or good will, or on account of the franchise of said company. Either party feeling aggrieved by the award of said commissioners may within thirty days next after the filing of the same in court, make application in writing to have the value of said property determined by a jury; and thereupon a trial may be had at the bar of said court in the same manner as other civil cases are there tried by jury; if upon the trial the jury, under the rule above prescribed, find the value of said property to be more than the amount awarded by said commissioners, said Gloucester Water Supply Company shall recover its costs; otherwise said city shall recover its costs, and such costs shall be taxed as in civil cases.

SECTION 17. This act shall be submitted to the qualified voters of the city of Gloucester for its acceptance and shall be void unless such voters, voting in their respective wards and precincts at a legal meeting called for that purpose by order of the city council in the same manner as meetings for municipal elections are called, or at any regular municipal election, shall, within three years from the passage of this act, determine by ballot by a majority vote of those present and voting thereon to accept the same. The warrant for notifying such meeting, if called specially as aforesaid, shall specify when the polls shall be opened for the purpose of voting and when they shall be closed.

SECTION 18. So much of this act as authorizes the submission of the question of its acceptance to the legal voters of
63 said city shall take effect upon its passage, but it shall not take further effect unless and until accepted, as hereinbefore provided, by the qualified voters of said city, and the number of meetings called for the purpose of this acceptance shall not exceed three in any one year.

64 EXHIBIT J.

Senate No. 281.

(Mr. Smith gives notice that he will move to substitute this bill for the report of the committee on water supply, leave to withdraw, on the petitions of the board of aldermen and others of the city of Gloucester that said city may be authorized to construct and maintain a system of water supply (accompanied by house bill No. 625.)

COMMONWEALTH OF MASSACHUSETTS.

In the year one thousand eight hundred and ninety-four.

An act to supply the city of Gloucester with pure water.

Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same, as follows.—

SECTION 1. The City of Gloucester may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes; and may establish fountains and hydrants, relocate or discontinue the same, may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECTION 2. The said city, for the purpose aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells not heretofore taken or purchased by the Gloucester Water Supply Company, within the limits of said city, also the Chebacco lakes in the towns of Essex, Wenham and Hamilton, and the waters which flow into the same and the water rights connected therewith, and obtain and take water by means of bored, driven, artesian or other wells on any land within said city, and hold and convey said water through said city and through said towns of Essex, Wenham and Hamilton from said lakes, and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding, storing, purifying and preserving such water and for conveying the same to any part of said city of Gloucester; and may erect, on the lands thus taken or held, proper dams, reservoirs, buildings, fixtures and other structures, and may make
65 excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works, under or over any lands, water courses, railroads or public or private ways, and along any such way, in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands,

and, under the direction of the board of selectmen of any town in which said ways are situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel on such ways.

The title to all land taken or purchased under the provisions of this act shall vest in said city, and the land so taken may be managed, improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interests of said city.

SECTION 3. Said city shall, within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the southern district for said county of Essex a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECTION 4. Said city shall pay all damages sustained by any person or corporation in property by the taking of any lands, right of way, water, water sources, water rights or easement, or by any other thing done by said town under the authority of this act, except that said city shall not be liable to pay any damages resulting from taking water from the said Chebacco lakes other than the Commonwealth itself would be legally liable to pay. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within the period of two years from the taking of such land or other property, or the doing of other injury under the authority of this act; but no such application shall be made after the expiration of said two years. No application for the assessment of damages shall be made for the taking of any water, water right or for any injury thereto until the water is actually withdrawn or diverted by said town under the authority of this act.

Said city shall pay all damages sustained under the authority of this act by the town of Essex in its alewife fishery, which, unless agreed upon, shall be assessed and determined in the manner hereinbefore provided; *provided, however*, that said city may construct and maintain suitable fishways for the preservation of said alewife fishery.

66 SECTION 5. In every case of a petition to the superior court for an assessment of damages the city may tender to the complainant or his attorney any sum, or may bring the same into court to be paid to the complainant for the damages by him sustained or claimed in his petition, or may in writing offer to be defaulted and that damages may be awarded against it for the sum therein expressed, and if the complainant does not accept such sum, with his costs up to that time, but proceeds in his suit, and does not recover greater damages than were so offered or tendered, not including interest on the sum recovered in damages, from the

date of such offer or tender, the city shall have judgment for its costs, after said date for which execution shall issue, and the complainant, if he recovers damages, shall be allowed his costs only to the date of such offer or tender.

SECTION 6. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount not exceeding in the aggregate five hundred and fifty thousand dollars; such bonds, notes or scrip shall bear on their face the words "City of Gloucester water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest, payable semi-annually, at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale or pledge the same for money borrowed for the purpose of this act upon such terms and conditions as it may deem proper; *Provided*, That such securities shall not be sold for less than the par value thereof. The said city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient, with the accumulations thereof, to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECTION 7. The said city, instead of establishing a sinking fund, may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall without further vote be assessed by the assessors of said city in each year thereafter until the debt incurred by said loan shall be extinguished, in the same manner as other taxes are assessed under the provisions of section thirty-four of chapter eleven of the Public Statutes.

SECTION 8. The return required by section ninety-one of chapter eleven of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the preceding section and the amounts raised and applied thereunder for the current year.

67 SECTION 9. The said city shall raise annually by taxation a sum which, with the income derived from water rates, will be sufficient to pay the current annual expenses of operating its water works and the interest as it accrues on the notes, bonds and scrip issued as aforesaid by said city, and such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECTION 10. Whoever shall use any water taken under this act without the consent of said city, or shall wilfully or wantonly corrupt, pollute or divert any of the waters taken or held by said city pursuant to the provisions of this act, or destroy or injure any

structure, work or other property owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort, and upon conviction of either of the above wilful or wanton acts shall also be punished by a fine not exceeding three hundred dollars or by imprisonment not exceeding one year.

SECTION 11. The occupant of any tenement shall be liable for the payment of the rent for the use of water in such tenement, and the owner shall also be liable, in case of the non-payment by the occupant, for all sums due for the use of water under this act, to be collected in an action of contract in the name of the City of Gloucester.

SECTION 12. The powers and duties granted to and imposed upon the City of Gloucester by this act, including the purchase or taking of any lands or other property or rights, shall be exercised by a board of water commissioners, consisting of three residents of the city, to be appointed by the mayor, with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval for the terms of one, two and three years, respectively, from the first Monday of February next following their appointment, and thereafter one commissioner shall be appointed each year for the term of three years from the first Monday in February; all such commissioners, except in case of removal, shall hold office until their successors are appointed in their stead; vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds at the time any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council for any cause which shall be deemed sufficient and shall be expressed in the vote of removal. The commissioners shall receive such compensation for their services as the city council, by a two-thirds vote of each branch thereof, shall determine.

SECTION 13. The said commissioners shall superintend and direct the construction, execution and performance of all the works, matters and things mentioned in the preceding section; they shall be subject to such ordinances, rules and regulations in the exe-
68 cution of such duties as the city council may from time to time ordain and establish, not inconsistent with the provisions of this act and the laws of this Commonwealth. Said water commissioners shall make all contracts for the above purpose in the name and behalf of the city, but no contract shall be made by them which involves the expenditure of money not already appropriated for the purpose by the city council of said Gloucester. A majority of said commissioners shall be a quorum for the exercise of the powers and the performance of the duties of the commission.

SECTION 14. The water commissioners shall fix such prices or rents for the use of water as shall produce annually as near as may be a net surplus over operating expenses and interest charges equal

to two per centum of the total amount of the bonds, notes or scrip issued under this act, after paying all current expenses of operating the water works and interest upon loans, and after payment of all expense for new construction, not exceeding ten thousand dollars in any one year after the original construction.

The commissioners of sinking funds of the city of Gloucester shall be trustees of the sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid shall be paid into the sinking fund, if any is established hereunder, and if said surplus does not equal two per centum of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which, with the surplus, shall equal said two per centum, and shall contribute said sum to the sinking fund.

Said commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECTION 15. The said town of Essex may connect water pipes with the main pipe of the city of Gloucester in said town, such connection to be made to the satisfaction and approval of the engineer of said city, and in such case said city shall furnish to the inhabitants of said town through the pipes so connected a supply of water for the extinguishment of fires and for domestic and other purposes, for which said town of Essex shall pay said city an equitable compensation, which, in case of disagreement, shall be determined by three commissioners to be appointed by the supreme judicial court upon application of either party and notice to the other, whose award, when accepted by said court, shall be binding upon the parties for the term of five years. And nothing in this act shall be construed to prevent the said towns of Essex, Wenham and Hamilton from supplying themselves with water from the said Chebacco lakes for fire, domestic and other purposes.

69 SECTION 16. At any time within thirty days after this act shall have been accepted by the City of Gloucester, as hereinafter provided, the Gloucester Water Company may notify the mayor of Gloucester in writing that it desires to sell to said city its lands, easements, waters, water rights, reservoirs, pipes, hydrants, tools and all apparatus used in supplying the inhabitants of Gloucester with water, and execute and deliver to said city proper deeds and instruments, in writing, conveying to said city the property aforesaid, whereupon the property thus conveyed shall become the property of the city of Gloucester, and the said city shall be liable to pay to said company the fair value of the property thus conveyed; and in case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court may, upon application of either party and notice to the other, appoint three commissioners, one of whom shall be a skilled engi-

neer and one learned in the law, who shall determine the fair value of said property conveyed as aforesaid, and whose award, when accepted by the court, shall be final. Said commissioners in determinmg the value of said property shall not take into account the franchise of said company, the value of the city of Gloucester and its inhabitants as a market for the sale of water, nor the income theretofore earned by said company, nor the earning capacity of said property, but shall only ascertain the fair value for use by said city of the specific property hereinbefore named which shall have been conveyed as aforesaid. If any part of the capital or assets of the company has been paid in in property instead of cash, the valuation heretofore placed upon such property by the company or otherwise shall not be conclusive in estimating its value under the foregoing provisions, but may be inquired into by said city, and if shown to have been excessive may be reduced by the authority fixing the price of the plant and property. And all said property so acquired by said city shall be thereafter held and managed under and according to the provisions of this act.

SECTION 17. This act shall be submitted to the qualified voters of the city of Gloucester for its acceptance and shall be void unless such voters, voting in their respective wards and precincts at a legal meeting called by order of the city council, in the same manner as meetings for municipal elections are called, shall, within three years from the passage of this act, determine by ballot, by a majority vote of those present and voting, to accept the same.

SECTION 18. So much of this act as authorizes the submission of the question of its acceptance to the legal voters of said city shall take effect upon its passage, but it shall not take further effect unless and until accepted, as hereinbefore provided, by the qualified voters of said city, and the number of meetings called for the purpose of this acceptance shall not exceed three in any one year.

70 EXHIBIT K.

Acts and Resolves of Massachusetts, 1895, *Chap.* 451.

"An act to supply the city of Gloucester with water.

Be it enacted, etc., as follows.—

SECTION 1. The City of Gloucester may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes; and may establish fountains and hydrants, relocate or discontinue the same, may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECTION 2. Said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells not heretofore taken or purchased by the Gloucester Water Supply Company, within the limits of said city, also the Chebacco

lakes in the towns of Essex, Wenham and Hamilton, and the waters which flow into the same and the water rights connected therewith, and may obtain and take water by means of bored, driven, artesian or other wells, on any land within said city, and hold and convey said water through said city and through said towns of Essex, Wenham and Hamilton, from said lakes, and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding, storing, purifying and preserving such water and for conveying the same to any part of said city of Gloucester; and may erect on the lands thus taken or held, proper dams, reservoirs, buildings, fixtures and other structures, and may make excavations, procure and operate machinery, and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works, and may construct and lay down conduits, pipes and other works, under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of the town in which said ways are situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel thereon. The title to all land taken or purchased under the provisions of this act shall vest in said city, and the land so taken may be managed, improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interests of said city.

SECTION 3. Said city shall, within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the southern district for the
71 county of Essex a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECTION 4. Said city shall pay all damages sustained by any person or corporation in property by the taking of any lands, right of way, water, water sources, water rights or easement, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on making application at any time within the period of two years from the taking of such land or other property or the doing of other injury under the authority of this act; but no such application shall be made after the expiration of said two years. No application for the assessment of damages shall be made for the taking of any water, water right or for any injury thereto until the

water is actually withdrawn or diverted by said city under the authority of this act. Said city shall pay all damages sustained under the authority of this act by the town of Essex in its alewife fishery, which, unless agreed upon, shall be assessed and determined in the manner hereinbefore provided; *provided, however,* that said city may construct and maintain suitable fishways for the preservation of said alewife fishery, said fishways to be constructed to the satisfaction of and to be approved by the commissioners on inland fisheries and game.

SECTION 5. In every case of a petition to the superior court for an assessment of damages the city may tender to the complainant or his attorney any sum, or may bring the same into court to be paid to the complainant for the damages by him sustained or claimed in his petition, or may in writing offer to be defaulted and that damages may be awarded against it for the sum therein expressed, and if the complainant does not accept such sum, with his costs up to that time, but proceeds in his suit, and does not recover greater damages than were so offered or tendered, not including interest on the sum recovered in damages from the date of such offer or tender, the city shall have judgment for its costs after said date, for which execution shall issue; and the complainant, if he recovers damages, shall be allowed his costs only to the date of such offer or tender.

SECTION 6. Said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount sufficient for such purpose, to be determined by the board of water commissioners hereinafter provided for. Such bonds, notes or scrip shall bear on their face the words, City of Gloucester water loan, and shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest, payable semi-annually, at a rate not exceeding six per cent. per annum, and shall be signed by the treasurer of the city
72 and be countersigned by the water commissioners hereinafter provided for. Said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purpose of this act, and upon such terms and conditions as it may deem proper; *provided,* that such securities shall not be sold for less than the par value thereof. Said city shall provide at the time of contracting said loan for the establishment of a sinking fund and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. Said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECTION 7. Said city instead of establishing a sinking fund may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same with- the time prescribed in this act; and when such vote has been passed the amount required thereby shall without further vote be assessed by the assessors of said city in each year thereafter until the debt incurred by said loan shall be extinguished, in the same

manner as other taxes are assessed under the provisions of section thirty-four of chapter eleven of the Public Statutes.

SECTION 8. The return required by section ninety-one of chapter eleven of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established whether action has been taken in accordance with the provisions of the preceding section, and the amounts raised and applied thereunder for the current year.

SECTION 9. Said city shall raise annually by taxation a sum which, with the income derived from water rates, will be sufficient to pay the current annual expenses of operating its water works and the interest as it accrues on the notes, bonds and scrip issued as aforesaid by said city, and such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECTION 10. Whoever uses any water taken under this act without the consent of said city, or wilfully or wantonly corrupts, pollutes or diverts any of the waters taken or held by said city pursuant to the provisions of this act, or destroys or injures any structure, work or other property owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three time the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall also be punished by a fine not exceeding three hundred dollars or by imprisonment not exceeding one year.

73 SECTION 11. The occupant of any tenement shall be liable for the payment of the rent for the use of water in such tenement, and the owner shall also be liable, in case of non-payment by the occupant, for all sums due for the use of water under this act, to be collected in an action of contract in the name of the City of Gloucester.

SECTION 12. The powers and duties granted and imposed upon the City of Gloucester by this act, including the purchase or taking of any lands or other property or rights, shall be exercised by a board of water commissioners, consisting of three residents of the city, to be appointed by the mayor, with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval for the terms of one, two and three years, respectively, from the first Monday of February next following their appointment, and thereafter one commissioner shall be appointed each year for the term of three years from the first Monday in February; all such commissioners, except in case of removal, shall hold office until their successors are appointed in their stead; vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds at the time any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two thirds vote of each branch of the city council for any cause which shall be deemed sufficient and shall be expressed

in the vote of removal. The commissioners shall receive such compensation for their services as the city council, by a two thirds vote of each branch thereof, shall determine.

SECTION 13. Said commissioners shall superintend and direct the construction, execution and performance of all the works, matters and things mentioned in the preceding sections; they shall be subject to such ordinances, rules and regulations in the execution of such duties as the city council may from time to time ordain and establish, not inconsistent with the provisions of this act and the laws of this Commonwealth. Said water commissioners shall make all contracts for the above purpose in the name and behalf of the city, but no contracts shall be made by them which involve the expenditure of money not already appropriated for the purpose by the city council. A majority of said commissioners shall be a quorum for the exercise of the powers and the performance of the duties of the commission.

SECTION 14. Said commissioners shall fix such prices or rents for the use of water as shall produce annually as near as may be a net surplus over operating expenses and interest charges equal to two per cent. of the total amount of the bonds, notes or scrip issued under this act, after paying all current expenses of operating the water works and interest upon loans, and after payment of all expense for new construction, not exceeding ten thousand dollars in any one year after the original construction. The commissioners of sinking funds of the city of Gloucester shall be trustees of the sinking
74 fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid shall be paid into the sinking fund, if any is established hereunder, and if said surplus does not equal two per cent. of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which, with the surplus, will equal said two per cent., and shall contribute said sum to the sinking fund. Said commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECTION 15. The town of Essex may connect water pipes with the main pipe of the city of Gloucester in said town, such connection to be made to the satisfaction of the engineer of said city, and in such case said city shall furnish to the inhabitants of said town through the pipes so connected a supply of water for the extinguishment of fires and for domestic and other purposes, for which the town of Essex shall pay to said city an equitable compensation. Said compensation in case of disagreement, shall be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, and the award of said commissioners, when accepted by said court, shall be

binding upon the parties for the term of five years. Nothing in this act shall be construed to prevent the towns of Essex, Wenham, and Hamilton from supplying themselves with water from the Chebacco lakes for the extinguishment of fires and for domestic and other purposes, or to prevent the town of Manchester from so supplying itself from Gravel pond, so-called.

SECTION 16. If within thirty days after this act shall have been accepted by the City of Gloucester, as hereinafter provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester in writing that it desires to sell to said city all the corporate property and all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all appliances owned by said company, and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same and manage and use the property thus conveyed for the purposes and under the provisions of this act. Whenever, within one year from the passage of this act, said city shall by a majority vote of the legal voters of said city, present and voting thereon at a legal meeting called for that purpose by order of the city council, or at any regular municipal election, vote to purchase said
75 property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said property shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. In case said city and said company, after conference thereon, shall be unable to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, who shall determine the fair value of said property, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company.

SECTION 17. This act shall be submitted to the qualified voters of the city of Gloucester for its acceptance and shall be void unless such voters, voting in their respective wards and precincts at a legal meeting called for that purpose by order of the city council, in the same manner as meetings for municipal elections are called, or at any regular municipal election, shall, within one year from the passage of this act, determine by ballot by a majority vote of those present and voting thereon to accept the same. The warrant for notifying such meeting, if called specially as aforesaid, shall specify when the polls shall be opened for the purpose of voting and when they shall be closed.

SECTION 18. So much of this act as authorizes the submission of the question of its acceptance to the legal voters of said city shall take effect upon its passage, but it shall not take further effect unless and until accepted as hereinbefore provided, by the qualified voters of said city; and the number of meetings called for the purpose of voting upon the question of its acceptance shall not exceed three in any one year.

Approved June 4, 1895.

76 EXHIBIT L.

Honorable Benjamin F. Cook, mayor of the city of Gloucester.

SIR: The Gloucester Water Supply Company hereby notifies you that it desires to sell to the City of Gloucester all the corporate property and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water.

A copy of the vote of said Gloucester Water Supply Company authorizing this notice is hereto annexed.

Dated at Gloucester this fifteenth day of August, 1895.

(Signed) GLOUCESTER WATER SUPPLY COMPANY,
By DAVID W. LOW, *Clerk.*

77 EXHIBIT M.

The Gloucester Water Supply Company hereby files with the city clerk of Gloucester a specification and description of all the corporate property, and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water.

Item 1. All the waters within or upon the parcel of land or real estate hereinafter described, and all the waters that may or can be obtained therein, or can be used or conveyed therefrom, and also all said parcel of land or real estate. Said land or real estate is situate in the city of Gloucester aforesaid, in ward eight thereof, and is bounded and described as follows.—Commencing at a stone bound marked "E" at the northern end of the dam at Dikes meadow, so-called; thence north 62 degrees 25 min. west 177 feet; thence north 52 degrees west 208 feet; thence north 33 degrees 30 min. east 114 8/10 feet; thence north 17 degrees 30 min. west 93 feet; thence south 78 degrees 40 min. west 148 5/10 feet; thence north 51 degrees west 92 2/10 feet; thence north 11 degrees 30 min. west 75 5/10 feet; thence north 4 degrees east 291 feet; thence north 3 degrees

east 233 feet; thence north 17 degrees 30 min. east 254 feet; thence north 29 degrees east 212 6/10 feet; thence north 36 degrees 30 min. east 582 5/10 feet; thence north 41 degrees east 755 7/10 feet; thence north 34 degrees 30 min. east 420 feet; thence north 53 degrees west 162 feet; thence south 52 degrees 30 min. west 467 5/10 feet; thence south 91 5/10 feet; thence south 35 degrees 34 min. west 92 5/10 feet; thence south 81 degrees 45 min. west 549 9/10 feet; thence south 33 degrees 15 min. west 313 4/10 feet; thence south 53 degrees 38 min. east 277 8/10 feet; thence south 13 degrees 10 min. east 161 5/10 feet; thence south 40 degrees west 82 5/10 feet; thence south 69 degrees 5 min. west 138 5/10 feet; thence north 36 degrees 25 min. west 150 feet; thence north 27 degrees 45 min. east 96 feet, to station "B" shown on plan next hereinafter referred to; thence north 45 degrees 45 min. west 150 1/10 feet, to station "A" shown on said plan; thence south 52 degrees 30 min. west 236 6/10 feet; thence south 69 degrees west 110 5/10 feet; thence south 75 degrees 30 min. west 83 feet; thence south 40 degrees 45 min. east 256 7/10 feet; thence south 2 degrees 10 min. east 167 5/10 feet; thence south 15 degrees 40 min. west 243 feet; thence south 19 degrees west 89 feet; thence south 45 degrees 45 min. west 113 feet; thence south 70 degrees 45 min. west 327 5/10 feet; thence north 79 degrees 15 min. west 81 6/10 feet; thence north 26 degrees 15 min. west 61 8/10 feet; thence north 22 degrees 30 min. east 138 1/10 feet; thence south 77 degrees west 93 feet; thence south 74 degrees west 110 8/10 feet; thence north 76 degrees 45 min. west 378 5/10 feet; thence south 71 degrees 45 min. west 217 5/10 feet; thence south 39 degrees east 302 feet; thence south 38 degrees 55 min. west 388 5/10 feet; thence south 76 degrees 50 min. west 384 feet; thence south 22 degrees 20 min. east 352 feet; thence south
78 82 degrees east 134 2/10 feet; thence north 56 degrees 45 min. east 263 feet; thence north 84 degrees 30 min. east 104 feet; thence south 58 degrees 30 min. east 175 feet; thence south 45 degrees east 132 feet; thence south 20 degrees west 116 feet; thence south 22 degrees 20 min. west 342 5/10 feet; thence south 15 degrees east 87 feet; thence south 85 degrees 50 min. east 200 5/10 feet; thence north 75 degrees 30 min. east 76 6/10 feet; thence north 35 degrees east 247 5/10 feet; thence north 12 degrees east 209 8/10 feet; thence north 30 degrees 45 min. east 224 5/10 feet; thence north 75 degrees 45 min. east 163 5/10 feet; thence south 76 degrees 50 min. east 219 5/10 feet; thence south 64 degrees 10 min. east 211 feet; thence south 43 degrees 10 min. east 244 5/10 feet; thence south 53 degrees 45 min. east 155 5/10 feet; thence south 72 degrees 30 min. east 79 feet; thence south 74 degrees east 97 6/10 feet; thence north 27 degrees 15 min. east 317 1/10 feet to the point of beginning. Including also the dam 290 feet in length at the top and 170 feet in length at the bottom, the pond having an area of about 85 acres, and all embankments, structures, pipes and gates in or upon said land or real estate and all fixtures annexed thereto.

The above described courses and distances are lines of surveys

and are shown upon a plan entitled "Plan of storage basin at Dikes meadow, showing land taken by Gloucester Water Supply Co., as surveyed by Theo. Overbeck C. E., June 1884." by full red lines from which lines offsets are taken to irregular points, shown by blue lines on said plan, which blue lines indicate the flowage line at high water mark and to which blue line or line of high water flowage said company owns, together with all the land or real estate between the outside broken red lines shown on said plan and the blue or flowage line, all of which land is owned by said company. Said plan was received and filed in the registry of deeds for said Essex county, southern district, upon July tenth, 1884.

Item 2. All the waters within or upon the parcel of land or real estate hereinafter described, and all the waters that may be or can be obtained therein, or can be used or conveyed therefrom, and also all said parcel of land or real estate. Said land or real estate is situate in the city of Gloucester aforesaid in ward eight thereof, and is bounded and described as follows.—Commencing at a point marked "A" on plan hereinafter referred to, being the second plan described in this instrument, near the southwestern end of the dam at Wallace brook; thence south 7 degrees 30 min. west 178 8/10 feet; thence south 31 degrees 30 min. west 55 5/10 feet; thence south 43 degrees 15 min. west 279 2/10 feet; thence south 55 degrees 15 min. west 196 3/10 feet; thence south 64 degrees 45 min. west 182 feet; thence south 14 degrees east 160 feet; thence south 29 degrees 35 min. west 391 7/10 feet; thence south 53 degrees 25 min. west 211 8/10 feet; thence south 1 degree west 235 8/10 feet; thence south 62 degrees west 173 8/10 feet; thence south 49 degrees west 266 feet; thence south 3 degrees west 114 feet; thence south 59 degrees 45 min. west 43 2/10 feet; thence south 59 degrees west 259 feet; thence south 62 degrees 45 min. west 144 feet; thence north 86 degrees 30 min. west 177 2/10 feet; thence south 11 degrees 45 min. west 151 feet; thence south 24 degrees 45 min. east 156 5/10 feet; thence south 10 degrees east 92 feet; thence south 45 degrees west 110 feet; thence south 47 degrees east 223 8/10 feet; thence north 70 degrees east 262 feet; thence north 40 degrees east 215 feet; thence north 38 degrees east 365 feet; thence north 36 degrees 30 min. east 451 5/10 feet; thence north 33 degrees 15 min. east 151 feet; thence north 41 degrees 45 min. east 416 feet; thence north 38 degrees 50 min. east 248 feet; thence north 20 degrees 45 min. east 223 feet; thence north 31 degrees east 224 feet; thence north 48 degrees 30 min. east 287 feet; thence north 71 degrees east 157 5/10 feet; thence north 81 degrees east 405 feet; thence north 34 degrees east 320 feet; thence north 45 degrees east 328 feet; thence north 36 degrees east 557 5/10 feet; thence north 35 degrees 15 min. east 341 feet; thence north 41 degrees east 407 feet; thence north 34 degrees west 232 5/10 feet; thence south 48 degrees west 227 feet; thence south 19 degrees 25 min. west 180 feet; thence south 71 degrees 25 min. west 194 feet; thence south 32 degrees 20 min. west 275 2/10 feet; thence south 16 degrees 35 min. west 162 5/10 feet; thence south 33 de-

grees 15 min. west 335 feet; thence south 60 degrees west 194 3/10 feet; thence south 72 degrees west 200 feet; thence north 68 degrees west 380 5/10 feet; thence south 40 degrees 30 min. west 344 feet, to the point of beginning. Including also the dam 230 feet in length at the top and 130 feet in length at the bottom, the pond having an area of about 35 acres, and all embankments, structures, pipes and gates in or upon said land or real estate and all fixtures annexed thereto.

The above described courses and distances are lines of surveys and are shown upon a plan entitled "Plan of land taken by Gloucester Water Supply Co., for storage basin at Wallace brook, Gloucester, Mass., from survey Theodore Overbeck, civ. eng., G. Norman Weaver, eng'r," by full red lines, from which lines offsets are made to irregular lines shown by blue lines on said plan, which blue lines indicate the flowage line at high water mark and to which blue line or line of high water flowage said company owns, together with all the land or real estate between the outside broken red line shown on said plan and the blue or flowage line, all of which land is owned by said company. Said plan was received and filed in the registry of deeds of said Essex county, southern district, upon September eleventh, A. D. 1884.

Item 3. A right of way 20 feet in width over a road or way from the easterly side of the basin above described, which road or way begins at a point southeasterly from the point marked "A" on the plan described *it* item 2 herein, at a point marked "C 85" on said plan, thence south 57 degrees east 460 feet over land now or formerly owned or supposed to be owned by Theophilus Bray, Joseph Bray, Mary Dennen, and Francis W. Homans to land and roadway of said Homans; thence over said Homans' way to be of 20 feet in width, north 37 degrees east 320 feet; thence north 27 degrees east 240 feet; thence north 2 degrees east 90 feet; thence north 30 degrees west 85 feet; thence north 16 degrees east 50 feet; thence north 34 degrees east 480 feet; thence north 22 degrees 55 min. east 260 feet to Essex avenue, being shown on said plan described in item 2 in this instrument.

80 *Item 4.* A right of way twenty feet in width, for the purpose of laying and repairing pipes, between the storage basin at Wallace brook and the pumping station at Mill brook, the same being over land of Albion Bray and others, and is fully shown upon said plan described in item 2 herein.

Item 5. A right of way 20 feet in width, for the purpose of laying and repairing pipes extending from Dikes meadow basin in ward eight in said Gloucester to the pumping station at Mill brook, so called, commencing at the dam at Dikes meadow at point 64 feet south 27 degrees 15 min. west from a bound, then south 55 degrees 30 min. east 505 8/10 feet; thence south 79 degrees east 243 feet; thence south 59 degrees east 349 feet; thence south 81 degrees east 318 feet; thence north 82 degrees east 103 feet; thence north 60 degrees 30 min. east 117 4/10 feet; thence north 50 degrees east 387 5/10 feet; thence north 72 degrees east 330 5/10 feet; thence north 81

degrees east 440 feet; thence north 69 degrees east 438 2/10 feet; thence north 57 degrees east 492 8/10 feet; thence north 68 degrees east 336 5/10 feet; thence north 65 degrees 45 min. east 405 7/10 feet; thence north 45 degrees 45 min. east 177 4/10 feet; thence north 21 degrees 55 min. east 147 feet; thence north 45 degrees 25 min. east 497 5/10 feet to said pumping station.

The above described lines are lines of survey and are shown on a plan entitled "Plan of land taken by Gloucester Water Supply Co., for a conduit from Dikes meadow to pumping station from survey by Theodore Overbeck, civil engineer, Aug., 1884" by full red lines; the outside lines of the way are shown on said plan by full black lines. Said plan was received and filed in said registry of deeds, September 11, A. D. 1884.

Also a piece of land situate in said ward eight, Gloucester, shown on said last named plan by broken red lines containing about 11,250 feet bounded southerly by the way last above described on the north by land now or late of A. D. Bray, on the east 75 feet by land now or late of said Bray, and on the west by land now or late of said Bray 75 feet.

Item 6. A right of way 20 feet in width situate at said Gloucester in ward eight thereof and extending from said pumping station to the supply reservoir on Bonds hill, so-called, bounded, beginning at the reservoir as shown on a plan entitled "Plan of land taken by Gloucester Water Supply Company for pumping main as surveyed by Theodore Overbeck, civil engineer, Gloucester, August, 1884. G. Norman Weaver, engineer," and from said reservoir running north 57 degrees west 40 feet to an angle; thence south 75 degrees west 83 7/10 feet; thence north 72 degrees west 2630 feet; thence north 57 degrees west 112 feet; thence north 45 degrees west 137 feet; thence north 57 degrees west 200 feet; thence north 77 degrees west 300 feet; thence north 80 degrees west 50 feet; thence north 74 degrees 30 min. west 212 feet; thence north 88 degrees west 257 feet; thence north 84 degrees west 247 feet; thence north 54 degrees west 219 feet; thence north 30 degrees 45 min. west 314 5/10 feet;
81 thence 83 feet under the Eastern railroad; thence 120 feet to said pumping station, all of which lines are lines of survey and are shown on said plan described in item 6 herein by full red lines, which red lines are the centre line of said way, and the side lines of said way are shown on said plan by full black lines distant at all points ten feet from said red lines. Said plan was received and filed in said registry of deeds upon September 11th, A. D. 1884.

Item 7. A piece of land situate at said Gloucester, in ward 8 thereof, near the land occupied by said company for reservoir, containing 5,000 square feet, bounded southwesterly 50 feet by land now or formerly of Marshall, northwesterly 100 feet by land now or late of Marshall, northeasterly 50 feet by land now or late of Marshall, and southeasterly by said company's land upon which its reservoir is located, said land being shown on said plan described in item 6 herein, and is included in broken red lines indicated on said plan.

Item 8. A right of way 20 feet in width, situate in said Gloucester,

in ward 8 thereof, extending from Western avenue, so called, to land of Walter Cressy, bounded, beginning at said avenue, near barn now or formerly of said Cressy; thence south 82 degrees 30 min. west 637 feet; thence north 51 degrees 30 min. west 145 4/10 feet; thence north 37 degrees 30 min. west 143 feet; thence north 52 degrees 30 min. west 67 feet; thence north 70 degrees west 109 5/10 feet, on to land of said Walter Cressy. Said courses and distances are lines of survey, and shown on a plan entitled, "Plan of land taken by Gloucester Water Supply Co., for reservoir and supply main, from survey of Theodore Overbeck, civ. eng'r, Gloucester, August, 1884," by full red lines, which red lines are the centre lines of said way, and the side lines of said way are shown on said plan by full black lines, distant at all points ten feet from said red lines. Said plan was received and filed in said registry of deeds September 11th, A. D., 1884.

Item 9. A right of way 20 feet in width situate in said Gloucester, in ward 8 thereof, for laying and repairing pipes, and is shown on plan entitled "Plan of land taken by Gloucester Water Supply Co., for location of supply main, from survey of Theodore Overbeck, civ. eng'r, Gloucester, September 4, 1884, G. Norman Weaver, eng'r," by full red lines of survey, which red lines and land commence at a point on Western avenue, in said Gloucester, 40 7/10 feet from the southwest corner of a dwelling house now or late of W. H. H. Davis, and 22 9/10 feet from the northeast corner of the bridge of canal; thence north 72 degrees 15 minutes west 85 3/10 feet; thence south 75 degrees west 99 feet; thence south 67 degrees 22 minutes west 78 4/10 feet to Western avenue. And the limits of said way are located as shown on said plan by full black lines on each side of said red lines and parallel with said red lines. Said plan was received and filed in said registry of deeds upon September 11th, A. D. 1884.

82 *Item 10.* All the waters within or upon the parcel of land or real estate hereinafter described, and all the waters that may or can be obtained therein or can be used or conveyed therefrom, and also all of said parcel of land or real estate. Said land or real estate is situate in said city of Gloucester, in ward 8 thereof, and is bounded and described as follows.—Near the head of "Little river," so-called, and bounded beginning at a beech tree at the westerly side of the road leading to Kettle cove (Magnolia avenue); thence north 82 degrees west 140 feet to a bend in the stone wall on land now or late of Widow Freeman; thence by said land now or late of Widow Freeman 64 degrees 15 min. west 29 feet; thence north 77 degrees 30 min. west 89 feet 6 inches; thence north 32 degrees 45 min. west 49 feet to the southerly bar post of road to woods from said Freeman's land; thence south 64 degrees west 44 feet to a stake and stones; thence south 27 degrees east about 256 feet to the northeasterly corner of Theophilus Bray's land; thence by said Bray's land south 14 degrees 45 min. east 109 feet to said Kettle Cove road; thence by said road to the place of beginning. With the right to keep and maintain the dam thereon, or any dam which formerly stood thereof; with the right to maintain thereon the mill

as the same now stands or formerly stood; with the right and privilege to flow land at any time heretofore flowed by Nathaniel Webster, the former owner of said land.

Also another parcel of land adjoining the last described premises, bounded easterly by the highway leading to Essex, southerly and southwesterly by Kettle Cove road, westerly by the last described lot, and northerly by land now or formerly of Widow Freeman as the wall stands or formerly stood. Said last described lot is subject to the right of said Freeman to pass and repass in the usual way as reserved to her in her deed to Thomas Hall, recorded in said registry, Book 751, leaf 269. Said premises are held by said company subject to the express condition or restriction that Nathaniel Webster, his heirs and assigns, shall forever have the right to cut ice upon any pond that may be made upon said land and upon any waters that may be stored upon any land flowed by any dam now or hereafter erected thereon, with the right in said Webster to remove ice when cut, and with the condition or restriction that neither said Gloucester Water Supply Company nor its successors or assigns shall have the right to cut ice upon any such pond made or water stored as above specified, as reserved in deed of said Webster to said company, dated February 16, 1884, recorded in said registry, Book 1,124, leaf 272.

Including also upon said land the pumping station, consisting of a brick building, coal shed and outbuilding connected therewith, one pair Knowles' compound duplex double-acting steam pumps, with surface condensers, one engine, and all fixtures, fittings, appliances and appurtenances contained in said pumping station building, with the foundations, settings, connections, fittings and fixtures thereof; and the pond, two dams, gates, pipes, and appliances, situate upon said land described in item 10 herein; also two horizontal steam boilers in said pumping station building, with the fixtures and connections thereof.

83 *Item 11.* A certain parcel of land, with the dwelling-house and barn thereon, situate upon the northerly side of Proctor street, in said Gloucester, bounded as follows: Northerly by a bank wall and land now or late of Plumer, Allen and McGlauflin, there measuring 85 feet 9 inches, more or less; southerly by Proctor street 100 feet, more or less; easterly by land now or late of Francis Proctor 98 feet, more or less, and westerly by land now or late of Rich and Hodgkins, there measuring 109 feet, more or less.

Item 12. A certain parcel of land, with the dwelling-house thereon, situate in said Gloucester, in ward 8 thereof, bounded northeasterly by land of Barnard Stanwood; southeasterly by land of said company; southwesterly by land formerly of Theophilus Bray or Daniel Bray, or both; and northwesterly by land of the Eastern Railroad Company, now or formerly, and land now or formerly of Meriden, subject to a right of way over a certain road to the woods, as reserved by Frederick Wallace and others in their deed to David W. Low, dated January 18, 1882, recorded in said registry, Book 1,075, leaf 224.

Item 13. A certain parcel of land situate on or near Bond's hill, in ward 8, in said Gloucester, and bounded and described as follows: Beginning at a bound in the wall between land now or late of Cressy and now or late of Babcock; thence south 55 degrees east 111 6/10 feet to a bound; thence south 8 degrees east 282 feet; thence south 82 degrees west 138 feet; thence north 74 degrees 10 min. west 231 feet; thence north 41 degrees 50 min. west 134 4/10 feet to a bound at said wall at land now or late of Marshall; thence north 57 degrees east by said wall and land now or late of said Marshall and others 370 5/10 feet to the place of beginning, with the right to pass and repass over the way now travelled between the last described parcel of land and the "Pest House road," so-called. Said company to maintain a gate across said way where it connects with said road, as provided in deed from Walter Cressy to said company, dated May 6, 1884, recorded in said registry, Book 1,129, leaf 235.

Also a right in one way 12 feet in width from the above granted premises over land now or formerly of Walter Cressy easterly to land now or formerly of Cressy and Bray, as shown upon plan described in item 8 herein. Including the reservoir and its foundations, with all gates, valves, fixtures, appliances and appurtenances used or connected therewith situate upon said land described in item 13 herein.

Item 14. All rights to take land, waters, water-rights and easements, to supply water, to lay pipes through private lands, and to dig therein, and all other rights and franchises conferred by law upon or vested in said Gloucester Water Supply Company by said chapter 167 of the Acts of the Legislature of Massachusetts for the Year 1881.

Item 15. The fourteen inch, wrought-iron, cement-lined conduit, about 5,474 feet in length, extending from Dike's meadow, upon land described in item 1 herein, through the way described in item 5 herein, to said pumping station building, upon land described in item 10 herein, with all gates, branches, fixtures, appliances and appurtenances connected with said conduit or in use therewith.

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Item 16. The fourteen inch, wrought-iron, cement-lined conduit, about four hundred and seventy-five feet in length, extending from Wallace Brook dam, so-called, upon land described in item 2 herein, through the way described in item 4 herein, and thence through Magnolia avenue to said pumping station building, upon land described in item 10 herein, with all gates, branches, fixtures, appliances and appurtenances connected with said conduit or in use therewith.

Item 17. The fourteen inch, wrought-iron, cement-lined conduit, about one hundred feet in length, extending from Lily Pond basin, so-called, upon land described in item 10 herein, to the pumping station building, also upon land described in item 10 herein, with all gates, branches, fixtures, appliances and appurtenances connected with said conduit or in use therewith.

Item 18. The sixteen-inch, wrought-iron, cement-lined force main,

about 5,380 feet in length, extending from said pumping station building, upon land described in item 10 herein, through the way described in item 6 herein, to said Bond's Hill reservoir, situate upon land described in item 13 herein, with all gates, branches, fixtures, appliances and appurtenances connected with said force main or in use therewith.

Item 19. The eighteen-inch, wrought-iron, cement-lined leading main, about 6,440 feet in length, extending from said Bond's Hill reservoir through the way described in item 13 herein; thence through Western avenue; thence through the way described in item 9 herein; and thence through said Western avenue to the corner of Main and Washington streets, connecting at said last named point with the distribution pipes of said company, with all gates, branches, fixtures, appliances and appurtenances connected with said main or in use therewith.

Item 20. All distribution pipes and all gates, connections, appliances, and appurtenances connected therewith, laid and maintained in the streets of said Gloucester, and used by said company for the supply of water, as follows (the lengths may vary slightly from the figures given).—

(1.) Four thousand eight hundred feet of fourteen-inch, wrought-iron, cement-lined pipe on Main street, from Washington street to Eastern avenue.

(2.) Eighteen hundred feet of twelve-inch, wrought-iron, cement-lined pipe on Washington street, from Main street to Commonwealth avenue.

(3.) Two thousand two hundred and fifty feet of ten-inch wrought-iron, cement-lined pipe on Washington street, from Commonwealth avenue to hydrant near B. Stanwood's house.

85 (4.) Two thousand five hundred and fifty feet of ten-inch, wrought-iron cement-lined pipe on East Main street, from Eastern avenue to Hammond street.

(5.) Fourteen thousand and eighty feet of ten-inch, wrought-iron cement-lined pipe on Magnolia avenue, from pumping station to Magnolia street.

(6.) Seven hundred and seventy-five feet of ten-inch, wrought-iron, cement-lined pipe on Fuller street, from Magnolia street to Hesperus avenue.

Eight-inch, wrought-iron cement-lined pipe laid and maintained as follows.—

(7.) Four thousand feet on East Main street, from Hammond street to Rocky Neck avenue.

(8.) Eighteen hundred and seventeen feet on East Main street, from Rocky Neck avenue to Gate lodge.

(9.) Twenty-two hundred and thirty-seven feet on Middle street, from Washington street to Pleasant street.

(10.) Three thousand six hundred and fifty feet on Prospect street, from Washington street to Main street.

(11.) Four hundred and twenty-five feet on Duncan street from Main street to Locust street.

(12.) Seven hundred and seventy-five feet on Park street, from Prospect street to Sheppard street.

(13.) Nine hundred and thirty-six feet on Pleasant street, from Main street to Prospect —.

(14.) Eight hundred and seventy-five feet on Eastern avenue, from Main street to Webster street.

Six-inch, wrought-iron, cement-lined pipe, laid and maintained as follows.—

(15.) Seven hundred and seventy-five feet on Addison street, from Washington street to School street.

(16.) Three hundred and thirty-seven feet on Allen street, from Prospect street to Liberty street.

(17.) One thousand seven hundred and sixty-eight feet on Bass avenue, from East Main street to Brightside avenue.

(18.) One thousand two hundred and seventy-five feet on Beacon street, from Washington street to Centennial avenue.

(19.) Eight hundred and eight feet on Brightside avenue, from Bass avenue to hydrant near Bass Rock hotel.

(20.) Two hundred and thirty-seven feet on Cedar street, from Park street to Sargent street.

(21.) Two hundred and twenty-five feet on Centre street, from Main street to Middle street.

(22.) One thousand three hundred and twenty-five feet on Chapel street, from East Main street to Mt. Pleasant avenue.

(23.) Eight hundred and twenty-five feet on Chestnut street, from Main street to Prospect street.

(24.) Eight hundred and twenty-five feet on Church street, from Middle street to Prospect street.

(25.) Five hundred and twenty-five feet on Cleveland street, from Maplewood avenue to opposite number — Cleveland street.

(26.) Nine hundred and seventy-five feet on Commercial street, from Main street to Fort square.

86 (27.) Seven hundred and seventy-five feet on Commonwealth avenue, from end of four-inch pipe on Commonwealth avenue to Lookout street.

(28.) Seven hundred and fifty feet on Dale avenue, from Middle street to Prospect street.

(29.) Nine hundred and fifty feet on Derby street, from Washington street to Maplewood avenue.

(30.) Five hundred and ten feet on Duncan street, from Locust street to end of pipe.

(31.) Eight hundred and fifty feet on Elm street from Main street to Prospect street.

(32.) Three hundred and sixty feet on Elwell street from Friend street to Sadler street.

(33.) Five hundred and twenty-five feet on Forrest street from Trask street to Millett street.

(34.) Five hundred and fifty feet on Fort square from Commercial street to George J. Tarr's oil works.

(35.) Three hundred and sixty-two feet on Foster street from Washington street to Winter street.

(36.) One thousand nine hundred and twenty-five feet on Friend street from Prospect street to Webster street.

(37.) Eight hundred and twenty-five feet on Granite street from Washington street to opposite the Marshall house on Granite street.

(38.) Nine hundred and sixty-two feet on Hammond street from East Main street to Haskell street.

(39.) Three hundred feet on Hancock street from Main street to Middle street.

(40.) Eight hundred feet on Millett street from Sargent street to Summit street.

(41.) Three hundred and fifty feet on Mt. Pleasant avenue from East Main street to Calder street.

(42.) One thousand two hundred and seventy-five feet on Mt. Vernon street from Prospect street to Perkins street.

(43.) Two hundred and seventy feet on Park street from Sargent street to Cedar street.

(44.) Seven hundred feet on Plum street from East Main street to Highland court.

(45.) Four hundred and twenty-five feet on Pearce street from Main street to Wharf street.

(46.) One thousand nine hundred and fifty feet on Perkins street from Taylor street to end of pipe.

(47.) One hundred and eighty feet on Porter street from Main street to Rogers street.

(48.) Four hundred and thirty-seven feet on Proctor street from School street to Church street.

(49.) Two hundred and fifty feet on Riggs street to Mansfield street to Summer street.

(50.) Eight hundred and sixty-two feet on Eastern avenue from Webster street to Hartz place.

(51.) One thousand seven hundred and twenty-five feet on Rocky Neck avenue from East Main street to James G. Tarr & Co.'s wharf.

(52.) One thousand one hundred and fifty feet on Rogers street from Porter street to Water street.

87 (53.) Five hundred and fifty-six feet on Sargent street from Sheppard street to Cleveland street.

(54.) Eight hundred and seventy-five feet on School street from Middle street to Railroad avenue.

(55.) Eight hundred and twenty-five feet on Sheppard street from Maplewood avenue to Sargent street.

(56.) Two hundred and seventy-five feet on Short street from Main street to Middle street.

(57.) Five hundred and sixty-two feet on Spring street from Main street to Prospect street.

(58.) Two hundred and eighty-seven feet on Staten street from Taylor street to Perkins street.

(59.) Seven hundred feet on Summer street from Granite street to Hovey street.

(60.) Two hundred and twenty-five feet on Taylor street from Prospect street to Staten street.

(61.) Three hundred feet on Trask street from Warner street to Forest street.

(62.) One thousand six hundred and seventy-five feet on Warner street from Prospect street to Miller street.

(63.) One thousand eight hundred and four feet on Washington square from Washington street to Granite street.

(64.) Four hundred seventy-five feet on Water street from Main street to Wharf street.

(65.) Six hundred and thirty-eight feet on Webster street from Eastern avenue to Friend street.

(66.) Two hundred feet on Wharf street from Pearce street to Waters street.

(67.) Nine hundred and seventy-five feet on Willow street from Sheppard street to Prospect street.

(68.) Two hundred and seventy-five feet on Winter street from Granite street to Foster street.

(69.) Nine hundred and sixty-two feet on Wonson street, from Rocky Neck avenue to Highland avenue.

(70.) Three hundred and forty-six feet on Boulder avenue, from Lexington avenue to end of pipe.

(71.) Four hundred and seventy-five feet on Cliff street from Lexington avenue to the Shore road.

(72.) Eight hundred and thirty-two feet on Fuller street from Hesperus avenue to the Shore road.

(73.) One thousand seven hundred and ninety-nine feet on Hesperus avenue, from Magnolia avenue to Merrill's gate.

(74.) One thousand six hundred and ninety feet on Lexington avenue, from Norman avenue to Shore road.

(75.) Seven hundred and fifty feet on Norman avenue, from Magnolia avenue to Lexington avenue.

(76.) Five hundred and sixty feet on Flume street, from Fuller avenue to Lexington avenue.

(77.) Seven hundred and seventy-two feet on Hesperus avenue, from Merrill's gate to end of pipe near Rowe's stable.

(78.) Four hundred and fifty feet on Cross street, from Eastern avenue to East Main street.

(79.) Two thousand nine hundred and fifteen feet on Western avenue, from eighteen-inch leading main, near foot of Bond's hill, to Hovey estate.

88 (80.) Three hundred feet on Maplewood avenue, from Sheppard street to Griffin's old shoe factory.

(81.) Four hundred and twenty-seven feet on Essex avenue, from eighteen-inch main at Western avenue to end of pipe.

(82.) One thousand three hundred and fifty feet on Whittemore street, from Washington street to the anchor works.

(83.) Two thousand seven hundred and ninety-one feet on Mt. Pleasant avenue, from East Main street to Calder street.

Four-inch, wrought-iron, cement-lined pipe, laid and maintained as follows—

(84.) Four hundred and forty-five feet on Vincent street from Main street to electric light station.

(85.) Three hundred feet on Beech street, from Commercial street to end of pipe.

(87.) Twenty-five feet on Commonwealth avenue, from Washington street to six-inch pipe on Commonwealth avenue.

(88.) Seven hundred and eighty feet on Exchange street, from Washington street to near Bridge street.

(89.) Five hundred feet on Tremont street, from Prospect street to Sheppard street.

(90.) Three hundred and twenty-six feet on Hovey street, from Summer street to end of pipe.

(91.) Nine hundred feet on Maplewood avenue, from end of six-inch pipe to Lane's house.

(92.) Three hundred and eighty-eight feet on Oak street, from Warner street to Mt. Vernon street.

(93.) One thousand four hundred and ninety-eight feet on Parker street, from East Main street to East Main street.

(94.) Five hundred and fifty feet on Pine street, from Church street to Washington street.

(95.) Four hundred and seventy feet on Sadler street, from Elwell street to Webster street.

(96.) Six hundred and fifty feet on Sargent street, from end of six-inch pipe to Groveland street.

(97.) Two hundred and thirty-seven feet on Taylor street, from Staten street to end of pipe.

(98.) One hundred and twenty feet on Summit street, from end of two-inch pipe on Summit street to a point on top of hill.

(99.) Five hundred and fifty feet on Hesperus avenue, from end of six-inch pipe to point opposite Mrs. Hayden's house.

(100.) Two hundred and fifty feet on Clarendon street, from Wonson street to Horton street.

(101.) One hundred and eighty-eight feet on Horton street, from Clarendon street to Rocky Neck avenue.

(102.) Nine hundred and ten feet on Western avenue, from Magnolia avenue to the Manchester line.

Two-inch, wrought-iron, cement-lined pipe, laid and maintained as follows.—

(103.) One hundred and forty-eight feet on Norwood's court, from East Main street to end of pipe.

(104.) Three hundred and eighty-six feet on Orchard street, from Washington street to end of pipe.

(105.) Three hundred and forty-nine feet on Willow street from end of six-inch pipe on Cleveland street to Willow street.

89 (106.) Two hundred and four feet on Lookout street, from Commonwealth avenue to end of pipe.

(107.) One hundred and twenty-six feet on Wharf street, from Water street to Burnham Brothers.

(108.) Three hundred and five feet on Hamden street, from Granite street to end of pipe.

(109.) Two hundred and fifty feet on Granite street, from end of six-inch pipe on Granite street to Hamden street.

(110.) Two hundred and four feet on Alpine court, from Commonwealth avenue to end of pipe.

(111.) Seven hundred and eighty-four feet on Washington street, from end of ten-inch pipe on Washington street to a point opposite Mr. Fisher's house.

(112.) One hundred and thirty-six feet on School street, from Proctor street to the church on the corner of Middle street.

(113.) Two hundred and sixty-four feet on Wall street, from East Main street to end of pipe.

(114.) Two hundred and ninety-nine feet on Pearl street, from Washington street to Railroad avenue.

(115.) Two hundred and eleven feet on Dike street, from Western avenue to end of pipe.

(116.) Two hundred and three feet on Webster street, from Friend street to a point near Sadler street.

(117.) One hundred and forty-seven feet on Maplewood court, from Maplewood avenue to end of pipe.

(118.) One hundred and eighty-five feet on the old Rockport road, from Maplewood avenue to Russell avenue.

(119.) One hundred and fifty feet on Beacon street, from end of six-inch pipe on Centennial avenue.

(120.) Three hundred and forty feet on Russell avenue, from old Rockport road to end of pipe.

(121.) Three hundred and twenty-two feet on Harold avenue, from Bridge street to end of pipe.

(122.) One hundred and twenty-five feet on Poplar street, from Maplewood avenue to Poplar court.

(123.) Three thousand one hundred and seventy-six feet on Bass rocks, from Brightside avenue to end of pipe on the shore.

(124.) Three hundred and two feet on Bridge street, from Washington street to the bridge.

(125.) Five hundred and eleven feet on Grove street, from Washington street to point opposite number 28 Grove street.

(126.) Two hundred and seventy-six feet on Harmony square, from Bass avenue to end of pipe.

(127.) One hundred and eighty-four feet on Sheppard street, from Sargent street to point opposite J. Hickey's house.

(128.) One hundred and fifty-seven feet on Centennial avenue, from Beacon street to a point opposite McPherson's house.

(129.) One hundred and fifty feet on Bickford street, from Trask street to end of pipe.

(130.) Two hundred and forty-nine feet on Pew court, from Main street to end of pipe.

(131.) Eighty-seven feet on Myrtle square, from Derby street to Hodgkin's house.

90 (132.) One thousand feet on Harrison avenue, from Eastern avenue to end of pipe.

(133.) Two hundred and fifty feet on Davis street, from Highland street to point opposite number 7 Davis street.

(134.) One hundred and eighty-six feet on Grove street, from Maplewood avenue to Acacia street.

(135.) One hundred and sixty-four feet on new street off of Hesperus avenue to point opposite Wadsworth's house.

(136.) Thirty-one feet off of Middle street, from Middle street to J. Mansfield's house.

(137.) Sixty-nine feet on Myrtle square, from Hodgkins' house to J. Nutton's house.

(138.) Two hundred and thirty-eight feet on Grove street, from Maplewood avenue to a point opposite number 66 Grove street.

(139.) Five hundred and twenty feet on Acacia street, from Grove street to Rockland street.

(140.) Two hundred and sixty-eight feet on Rockland street, from Maplewood avenue to Acacia street.

(141.) Four hundred and thirteen feet on Summit street, from Millett street to Trask street.

(142.) Five thousand nine hundred and sixty-five feet on Stanwood's point, from pumping station, Magnolia avenue, to a point opposite C. Rowe's house.

(143.) Four hundred and sixty-five feet on Commonwealth avenue, from Centennial avenue to end of pipe.

(144.) Eight hundred and fifty feet on Bridge street, from Commonwealth avenue to Harold avenue.

(145.) Six hundred and fifty-six feet on Centennial avenue, from Commonwealth avenue to Beacon street.

(146.) Seven hundred and thirty feet on Maplewood avenue from end of four-inch pipe to Poplar street.

(147.) Four hundred and thirty-three feet on Harrison place, from Bridge street to end of pipe.

One and one-half inch, wrought-iron, cement-lined pipe, laid and maintained as follows.—

(148.) One hundred feet on Brightside avenue, from end of six-inch pipe to Beech street.

(149.) One hundred feet on Blyman avenue, from Granite street to point opposite J. Scott's house.

(150.) Three hundred and eighty-seven feet on Columbia street, from Church street to School street.

(151.) One hundred and sixty-two feet on Fayal court, from Friend street to end of pipe.

(152.) One hundred and forty-five feet on Mansfield street, from Western avenue to point opposite the Hennesy house.

(153.) One hundred and fifty-one feet on Mason court, from Mason street to the end of pipe.

(154.) One hundred and seventy-one feet on Millett street, from Summit street to end of pipe.

(155.) Three hundred and twelve feet on Orchard street, from Winter street to end of pipe.

(156.) One hundred and sixty-two feet on Rockwood place, from Friend street to end of pipe.

91 (157.) One hundred and forty-two feet on Maplewood avenue, from end of four inch pipe to Poplar street.

(158.) One hundred and forty feet on Millett street, from Summit street to end of pipe.

(159.) Two hundred and eighteen feet on Rackliff street, from Fremont street to end of pipe.

(160.) Two hundred and sixty-five feet on Howe street, from Main street to end of pipe.

(161.) One hundred thirty-nine feet on Pew place, from Perkins street to end of pipe.

(162.) Four hundred and twenty feet on Sayward street, from East Main street to Bass avenue.

(163.) Two hundred and two feet on Wells court, from Commonwealth avenue to end of pipe.

(164.) One hundred and twenty-three feet on Cook's wharf, from Main street to the end of pipe.

(165.) One hundred and twenty feet on Lyman avenue, from Granite street to end of pipe.

(166.) Three hundred and thirty-nine feet on Orchard street, from Winter street to the end of pipe.

(167.) Three hundred and seventy-five feet on Smith street, from Maplewood avenue to Clark street.

One and one-quarter inch, wrought-iron, cement-lined pipe, laid and maintained as follows.—

(168.) Thirty-four feet on Arthur street, from Cleveland street to end of pipe.

(169.) Fifty feet on Morton place, from Harrison place to end of pipe.

(170.) Sixty-six feet on Trask street, from Summit street to Silva's house.

One-inch, wrought-iron, cement-lined pipe, laid and maintained as follows.—

(171.) One hundred and fifty-three feet on Sylvan street from end of one and one-half inch pipe to Sylvan court.

(172.) Eighty-one feet on Arthur court, from Arthur street to end of pipe.

(173.) One hundred and eighty-six feet on Franklin square, from Prospect street to J. Pew's house.

(174.) One hundred and forty-two feet on Commercial court, from Commercial street to end of pipe.

(175.) Two hundred and forty feet on Bickford street, from Trask street to the end of pipe.

(176.) Twenty-eight feet on Granite court, from Lyman avenue to end of pipe.

(177.) Five hundred feet at Bass rocks, from end of two-inch pipe to Judge Sherman's house.

(178.) Seventy-one feet on Maplewood court, from Maplewood avenue to end of pipe.

(179.) Three hundred and thirty-eight feet on Cedar street, from Willow street to Maplewood avenue.

All as shown on plans described in item 29 herein.

92 *Item 21.* Two hundred and forty-one water gates upon said distribution pipes, the locations of which are shown upon said plans described in item 29 herein and in a record book described in item 32 herein.

Item 22. One hundred and eighty-one fire hydrants connected with said distribution pipes, the locations of which are shown upon said plans described in item 29 herein and in said record books described in item 32 herein.

Item 23. Connections from distribution pipes with fourteen stand-pipes for supplying street watering carts, which stand-pipes are located as follows.—

One on Middle street, opposite building numbered 24 on said street; one at the corner of Spring and Prospect streets; one on Lexington avenue, at the corner of Norman avenue; one on Magnolia avenue, near the north driveway leading to W. B. Williams' house; one on East Main street, near the southerly end of Hammond street; one on East Main street, at the corner of Bass avenue; one on Park street, near Prospect street; one on Prospect street, near the old gun house, so-called; one at the square at East Gloucester; one on Washington street, near the building numbered 94 on said street; one at the junction of Maplewood avenue and Cleveland street; one on Washington street, opposite Whittemore street; one at the junction of Eastern avenue and Hartz place; and one on Western avenue, west of Essex avenue.

Item 24. Connections from distribution mains with six drinking fountains, which fountains are located as follows.—

One at the corner of Pleasant and Prospect streets; one on Main street, at the corner of Spring street; one on Eastern avenue, near Webster street; one on East Main street at the square; one on Western avenue, at Lufkin's blacksmith shop; and one at the corner of Washington and Angle streets.

Item 25. Seventeen air valves, with connections, located on distribution pipes and shown on said plan described in item 29 herein.

Item 26. Two thousand and ninety-six service-pipes, from said distribution pipes to premises of consumers, with connections, fittings, valves, fixtures and appurtenances, the locations of which service-pipes are shown in three application books and one service-pipe record book, which books are described in item 28 herein. Said service-pipes being numbered from one to two thousand and ninety-six inclusive in said books, and which books are now at the office of said company, at number 10 Proctor street aforesaid.

Item 27. Contracts in writing between said company and said City of Gloucester for supplying said city with water for fire purposes, which contracts are now on file at the city clerk's office in said city.

93 *Item 28.* Three record books, marked "A," "B," and "C" respectively, of applications for water, and one service-pipe record book containing a record of service-pipes laid. Said books are now at the office of said company, at number 10 said Proctor street.

Item 29. Two plans of the water supply system of the company, showing the locations of said distribution pipes and the locations of said gates, valves and hydrants, and of the stand-pipes described in item 23 herein, one entitled "Plan showing location of water pipes in ward one, compiled by Theo. Overbeck, civil engineer, April, 1886, scale 100 feet equal 1 inch." Both said plans being now at said company's office, at number 10 Proctor street aforesaid.

Item 30. Water rate register containing a list of the water-takers of said company, numbered from one to thirty-three hundred and seventeen inclusive, with a record of the annual water rate paid by each taker and the residence of such taker. Said register is now at said company's office, at said number 10 Proctor street.

Item 31. A meter register book showing a list of consumers taking water from said company by meter. Said book is now at said office of said company.

Item 32. Two location record books marked "A" and "B" respectively, showing the location of all said gates, hydrants and pipes. Said books are now at said company's office, number 10 Proctor street.

Item 33. Stock and construction tools in work shop at said number 10 Proctor street, Gloucester, as follows.—

199 service boxes; 36 ¾ inch elbows; 35 1-inch elbows; 22 1¼ inch elbows; 2 1½ inch elbows; 17 2-inch elbows; 15 2-inch 45 degree elbows; 5 1-inch 45 degree elbows; 3 1¼ inch right and left elbows; 120 three-quarter inch tees; 49 one-inch tees; 35 one and one-quarter inch tees; 11 two-inch tees; 12 one and one-half by three-quarter inch reducing tees; 18 one and one-half by one-inch reducing tees; 148 one by three-quarter inch reducing tees; 38 two-inch by one-inch reducing tees; 15 one and one-quarter by one-inch reducing tees; 9 two-inch by one-inch reducing tees; 8 one-inch by three-quarter-inch reducing tees; 16 one and one-half inch by one and one-quarter inch bushings; 14 two-inch by one and one-half inch bushings; 10 two-inch by one-inch bushings; 13 one and one-half inch by three-quarter-inch bushings; 22 one and one-quarter by one-inch bushings; 19 one-inch by three-quarter inch bushings; 11 three-quarter by one-half inch bushings; 4 two-inch nipples; 26 one and one-half inch close nipples; 14 one and one-quarter inch close nipples; 3 one-inch close nipples; 12 three-quarter-inch close nipples; 3 one-half inch close nipples; 24 solder nipples one inch to three-quarter; 56 three-quarter inch right and left couplings; 93 one-inch right and left couplings; 28 one-half inch right and left couplings; 11 one and one-quarter
94 inch right and left couplings; 3 one and one-half inch right and left couplings; 2 two-inch right and left couplings; 486

three-quarter inch spare couplings; 55 one-inch spare couplings; 84 one and one-half inch couplings; 67 one and one-quarter inch couplings; 193 two-inch couplings; 18 two-inch plugs; 49 one and one-half inch plugs; 46 one and one-quarter inch plugs; 64 one-inch plugs; 23 three-quarter inch plugs; 12 two-inch unions; 17 one and one-half inch unions; 19 one and one-quarter inch unions; 16 three-quarter inch unions; 3 one-half inch unions; 35 one-inch caps; 41 three quarter inch caps; 2 two-inch caps; 36 one-inch corporation cocks; 24 one and one-half inch corporation cocks; 18 one and one-quarter inch corporation cocks; 25 eight-inch corporation cocks; 19 five-eighths inch corporation cocks, without tail pieces; 3 three-quarter inch crosses; 3 one-half inch crosses; 1 one and one-quarter inch crosses; 3 one and one-half inch crosses; 38 three-quarter inch stop and waste cocks; 4 one-inch stop and waste cocks; 7 inch and one-quarter stop and waste cocks; 3 one and one-half inch stop and waste cocks; 29 one-inch stop and waste cocks; 5 eight-inch by six-inch cement-lined tees; 4 eight-inch by four-inch cast-iron tees; 1 six-inch by four-inch cast-iron tee; 1 eight-inch by eight-inch cast-iron tee; 2 six-inch by six-inch cast-iron tee-; 5 hydrant jackets; 3 hydrant posts; 1 eight-inch gate valve; 1 six-inch hydrant; 2 eight-inch gates; 3 six-inch cast-iron sleeves; 4 wrought-iron rings; 62 five-eighths inch goose-necks; 2 coffin hydrants, 1 Chapman hydrant; 8 gate tops; 2 eight-inch, cast-iron, one-sixteenth bend; 2 cast-iron globe 1–32 bend; 2 eight by six-inch globe tees; 2 lengths ten-inch cement pipe; ½ keg white lead; small can lard oil; one gallon oil can; 1 coil rope; 2 bales of winding rope; 1 two and one-half inch seat valve; 1 crank; 2½ pigs of lead; 5 four-inch cement plugs; 6 eight-inch cement plugs; 2 twelve-inch cement plugs; 2 six-inch cement plugs; 1 iron punch; 3 feet of 5-inch cast-iron pipe; 1 large winding stick; 3 small winding sticks; 1 Russell bilge pump hose and connections; one diaphragm pump hose and connections; 2 riveting irons; 3 barrels of cement; 373 feet of one-half inch iron pipe; 132 feet three-eighths inch iron pipe; 50 feet one and one-fourth plain iron pipe; 1 grindstone complete; 1 furnace for tool sharpening; 2 lawn sprinklers; 126 lengths of two-inch cement-lined pipe; 87 lengths of one-inch cement-lined pipe; 26 lengths of one and one-fourth inch cement-lined pipe; 5 lengths of one-inch plain pipe; 16 lengths of two-inch plain pipe; 7 iron chains; 3 tag ropes; 1 set of single block and fall; 1 set of double block and fall; 3 double blocks; 24 picks; 2 long-handled shovels; 63 round-pointed shovels; 24 pick handles; 7 square-pointed shovels; 1 coal shovel; 8 axes; 8 striking hammers; 2 sledge hammers; 412 five-inch, wrought-iron sleeves; 320 six-inch wrought-iron sleeves; 4 bundles ten-inch wrought-iron sleeves; 1 set derrick plates; 2 cast-iron tampers; 2 paving pounders; 73 blast drills; 1 spade; 1 snow shovel; 1 crow and plate; 2 large metal pots; 2 large ladles; 1 pressure pump and hose for same; 2 large hydrant caps; 1 small hydrant cap; 1 can turpentine; 1 pot black paint; 1 box of plugs and feathers; 1 hammer for drilling; 11 plug drills; 7 spoons for blasting; 3 pots nice black paint; 4 paint brushes; 4 crowbars; 1 can linseed oil; 1

tunnel bar; 1 whitewash brush; 1 sponge; 1 garden rake; 1 coal
95 sieve; 1 wrench for shut-off; 1 brass hydrant wrench; 4 padlocks; 3 Johnson pumps; 50 feet three-fourth inch hose; 3 service keys; 3 gate keys; 1 gate box cleaner; 1 pen of charcoal; 13 water buckets; 2 barrels of clay; 1 barrel coal; 25 extension pieces for service boxes; 1 pair scales; 40 lanterns; 1 box seats for service boxes; 3 wheelbarrows; 2 sand screens; 2 charcoal shovels; 2 derricks; 1 tar kettle; 1 five-gallon can; 2 one-gallon oil cans; 14 three-quarter-inch corporation cocks for cast-iron pipes; 13 spindles for valves; one-half box resin; 1 large vice and bench; 1 small vice and bench; 1 mortar box; 1 lining machine for small pipe and bench; 1 old stove; 1 iron ratchet stop drill; 6 feet of one-half inch hose; 1 coil of jute; 1 Chapman hydrant; 1 hot water heater and coil for heating water; 1 wash boiler and hose; 3 wash boilers; 2 one and one-half inch valves; 1 one and one-quarter inch valve; 1 number 1 die stock; 1 large die stock; 1 large ratchet die stock; 1 Jaricki die stock; 1 set of dies for Jaricki die stock; 1 set of dies for large die stock; 1 three-quarter inch, 1 one-inch, 1 one and one-quarter inch, 1 one and one-half inch, and 1 two-inch dies; 1 one-inch right and left die; ¼ keg small nails; 1 box nails; 7 lantern globes; ½ box hydrant bolts; 9 large drill handles; 4 large drill handles; 5 pick handles; 1 Douglass force pump; 6 meter counters; 1 coil of one-inch lead pipe; 1 batter coil wire for same; 1 small jug, 1 large bottle; 1 derrick rope; 2 large hydrant covers; 1 small hydrant cover; 1 pair large pipe tongs; 1 pair small pipe tongs; 1½ coils five-eighths inch lead pipe; 2 pair blacksmith tongs; 1 three-foot Stillson wrench; 2 two-foot Stillson wrenches; 2 eighteen-inch Stillson wrenches; 1 fourteen-inch Stillson wrench; 2 three-wheel pipe cutters; 1 small pipe cutter; 1 ten-inch monkey wrench; 1 fourteen-inch monkey wrench; 1 box caulking irons; 1 chisel and hammer; 2 pair snips; 1 rivet set; 2 clawhammers; 4 wrenches; 2 machine-hammers; 1 mallet; 2 paving hammers; 2 cold chisels; 1 pair hose pliers; 15 files; 2 screwdrivers; 1 turn pin; 2 rasps; 4 small hydrant keys; 7 soldering coppers; 6 pair rubber mittens; one-half dozen solid punches; 15 lbs. solder; 1 lot of block tin pipe; 3 coils of block tin pipe for thawing; 9 cast-iron corporation cocks; 4 three-quarter inch globe valves; 1 one-inch globe valve; 5 one-half inch globe valves; 3 plug valves; 3 one-inch plug valves; 1 one and one-quarter inch plug valve; 2 gate spindles; 2 sets of derrick rings; 1 large iron pot; 2 solder moulds; 9 cakes of block tin; 1 large fire king stove; 1 bench charcoal stove, with funnel; 5-gallon can of machine oil; 1 gallon black varnish; 1 hose spanner; 4 pair rubber boots; 1 small Nash meter; 24 four-inch sleeve; one-half dozen eight-inch sleeve; 1 window brush; 1 sheet-iron roller; 4 fourteen-inch iron rings; 3 sixteen-inch rings; 1 eighteen-inch ring; 2 pairs of window blinds; 2 kegs of iron rivets; 1 four-inch cone; 2 ten-inch cones; 1 eight-inch cone; 1 six-inch cone; 9 one-half inch drills; 1 one and one-half inch drill; 1 one and one-quarter inch drill; 1 one and one-half inch packing box; 1 one and one-quarter inch packing box; 2 one-

half inch packing boxes; 3 one-inch drills; window awning with frame; 1 hydrant top; 10 water meters, assorted sizes; 1 dozen covers for service boxes; small coal shovel; large poker; 4 coils sealing wire; 2 pair window blinds; 1 tag rope chain; 13 96 feet of six-inch stove pipe; 1 handle for mower; 1 bracket lamp; 1 small bag of waste; 2 large window frames; 4 grub hooks; 1 can tallow; 1 iron screen; 7 short knives for cementing pipe; 1 long knife for same; 1 large ball hammer; 1 small dark lantern; 1 dozen ¾ wheels for cutters; 10 picks; 6 hand drills; 4 service box screws; 1 inch and one-quarter brass meter coupling; 1 inch and one-half meter coupling, brass; 2 small oil feeders; 1 set saws, complete; 1 roll of rubber cloth; 4½ cast iron pipe; 6 feet eight inch cast-iron pipe; 20 feet four-inch cement-lined pipe; 25 feet six-inch, cement-lined pipe; 2 lengths of eight-inch, cement-lined pipe.

Item 34. Stock, supplies and tools at said pumping station building, on land described in item herein, as follows.—

50 feet of hose and nozzle for hydrant; 1 bundle of hair felt; 1 bag waste; 3 lbs. rubber packing; 3 lbs. steam packing; 27 feet of three-fourths inch Eureka packing; 5 lbs. Selden's steam packing; 3 lbs. hemp packing; 12 lbs. square flax packing; 1 roll of Jenkins' packing; 1 yard sheet rubber packing; 1 roll Rainbow packing; 20 lbs. second-hand rubber packing; 1 broom; 1 chandelier; 73 rubber water valves; 1 piece of wire screen, 6 feet by 2 feet; 10 lbs. Garlot steam packing; 1 two-inch brass union; 1 one and one-half inch brass union; 1 one and one-half inch brass valve; 2 three-quarter inch check valves; 1 three-eighth inch brass check valve; 1 one and one-half inch valve; 1 and one-half brass lock nut; 1 inch and one-quarter brass plug; 1 pair twelve-inch hinges; 1 box nails; 5 brass lamps; 12 rubber gaskets; 3 oil cans; 14 water glasses for boilers; 1 step-ladder; 1 door-mat; 2 two-quart oil cans; 2 one-gallon oil cans; 1 tunnel; 1 squirt oil can; 1 large screw-driver; 2 Stillson wrenches; 3 packing hooks; 1 eight-inch Stillson wrench; 1 twelve-inch and 1 twenty-inch Stillson wrench; 1 six-inch, 1 twelve-inch, and 1 twenty-inch monkey wrench; 1 duster; 2 water buckets and one slate; 2 thermometers; 2 chairs; 150 brass valve-springs; 4 rubber gaskets for hand-plates; 1 nickel lamp; 5 lamp chimneys; 3 lantern globes; 6 files; 4 steel springs for valves; 2 straight-way wrenches; 1 one-inch valve; 1 hammer; 4 cold chisels; 1 brass ⅜ inch union; 1 brass ⅜ inch valve; 3 steel punches; 1 street wrench; 7 cast-iron wrenches for pumps; 1 hydrant wrench; 9 eye bolts; 1 pair nippers; 1 pair chain tongs; 1 can of polishing oil; 1 can linseed oil; 10-gallon oil tank; 1 one-gallon oil can; 1 two-gallon oil can; 9 cast-iron socket wrenches; 1 lot washers; 1 lot of bolts; 7 coal scoops; 1 stone hammer; 1 damper chain; 1 pair scales; 2 tube scrapers; 1 tube blower; 1 set fire-irons; 1 coal barrow; 1 axe; 1 shovel; 72 feet one-inch pipe; 8 feet two-inch pipe; 16 feet three-fourth inch pipe; 12 feet one-fourth inch pipe; 72 feet one and one-fourth inch pipe; 2 oil barrels; 5 lanterns; 1 crow-bar; 1 ash scoop; ½ barrel machinery oil;

¼ barrel cylinder oil; ½ barrel kerosene oil; 2 picks; 2 scythes; 1 bush-cutter; 1 grub hoe; 2 pieces of chain; 1 six-inch earthern Y pipe; 1 four-inch earthern elbow; 1 four-inch trap; 2 tons stove coal; 1 garden rake; 30 tons soft coal; 5 feet four-inch wrought-iron pipe; 12 feet four-inch wrought-iron pipe; 1 coal screen; 2 oil barrels; 1 crowbar for furnace; 1 lot old lumber; 5 fire bricks; 1 bucket of odd fittings.

97 *Item 35.* Stock and supplies in yard at pumping station, on land described in item 10 herein, as follows.—

1 four-inch on twelve-inch branch cement; 2 lengths of 18-inch cement pipe; 2 lengths of 18-inch cast-iron pipe; 4 lengths of 16-inch cast-iron pipe; 19 lengths of 14-inch cement pipe; 1 length of 16-inch cement pipe; 9 lengths of 12-inch cement pipe; 1 sixteen-inch by six-inch cement branch; 1 fourteen-inch by six-inch cement branch; 1 cement-inch by fourteen-inch cast-iron branch; 1 six-teen-inch by twelve-inch cast-iron branch; 1 eighteen-inch cast-iron sleeve; 1 sixteen-inch cast-iron quarter bend; 1 fourteen-inch cast-iron quarter bend; 1 sixteen-inch foot valve; 1 twelve by ten-inch cast-iron branch; 1 sixteen-inch ⅛ bend; 2 ten by eight cement branches; 1 eight by six cement branch; 184 four-inch shells; 11 lengths of four-inch cement-lined pipe; 6 lengths of six-inch cement pipe; 10 lengths of eight-inch cement pipe; 10 lengths of ten-inch cement pipe; 20 lbs. of ⅜ inch rubber water packing; 2 six-inch by six-inch cement branches; 1 four-inch by four-inch cast-iron branches; 1 mortar box; 3 wheelbarrows; 1 old double wagon; 1 plank coal shute on railroad-bank.

Item 36. Stock, supplies and tools on Western avenue, near Essex avenue, on land belonging to the city of Gloucester, as follows.—

1 sand screen; 1 mortar box; 36 feet 18-inch cast-iron pipe; 24 feet 6-inch cast-iron pipe; 12 feet 8 inch cast-iron pipe; 20 feet 18-inch cement-lined pipe; 2 coffin hydrants; 247 feet 8-inch cast-iron pipe; 84 feet 6-inch cast-iron pipe; 1 length of 18-inch cast-iron pipe; 1 lining machine; 1 sand bin; 248 feet 6-inch cement-lined pipe; lot of wood for covering blasts.

Item 37. Stock, supplies and tools on East Main street near Reed and Gammidge's on said East Main street, as follows.—

753 feet 8-inch cast-iron pipe.

Item 38. Office furniture and fixtures now at the office of said company, at said No. 10 Proctor street, as follows.—

1 large desk in outer office; 1 safe; 1 rack for books; 1 black walnut counter, with railing with plate glass; 1 carpet on outer office; 6 curtains; 1 carpet in inner office; 6 chairs; 1 desk stool; 1 desk on counter; gas fixtures; gas shades; 1 letter file; 2 awnings; 1 waste basket; 1 spittoon; 1 clock; 1 water gauge; 1 paper file; 1 thermometer; 4 window screens; 1 hand stamp; 1 large door mat; 1 lamp; 1 ink filler; 1 water bucket; 2 brooms; 1 dust broom; 1 dust pan; 1 mop holder; 1 window brush; 1 scrub brush.

Item 39. All the debts due said company from water takers, as shown by the books of the company herein named. Also all in-

surance policies of said company by which any of the property herein described is insured against fire.

Item 40. The rights, privileges and easements acquired by said company under said chapter 167 of the Acts of the Legislature of Massachusetts for the Year 1881, and now in use by it, of laying and maintaining water pipes and mains in said streets, and of making connections therewith, for the purpose of supplying said city
98 and the inhabitants thereof with water, and all property, property rights, privileges, easements, waters, and water-rights of said company, and all the rights and franchises of said company whether for supplying water to the city of Gloucester and the inhabitants thereof and of collecting water rates therefor or otherwise.

Hereby intending to specify and describe all the corporate property, and all the rights, privileges, easements, lands, waters, water, rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures-hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water.

In witness whereof, the said Gloucester Water Supply Company has caused these presents to be signed in its name, by David W. Low, its clerk, thereto duly authorized by vote of said company, a copy of which is hereto annexed, and its corporate seal to be hereto affixed, this fifteenth day of August, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) GLOUCESTER WATER SUPPLY COMPANY,
By DAVID W. LOW, *Clerk.*

Executed and filed with the city clerk of Gloucester, in presence of—

(Signed) JOHN E. McCUSKER.

At a meeting of the Gloucester Water Supply Company, duly called for the purpose, and held at the office of said company, number 10 Proctor street, in the city of Gloucester, Massachusetts, on Wednesday, the fourteenth day of August, A. D. 1895, at twelve-thirty o'clock in the afternoon, the following vote was passed.—

Whereas, the Gloucester Water Supply Company was incorporated under chapter 167 of the Acts of the Legislature for the Year 1881, for the purpose of furnishing the inhabitants of the city of Gloucester with pure water for the extinguishment of fires, and for domestic, mechanical, and other purposes, with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in said act; and

Whereas, by said act it was provided that the City of Gloucester should have the right at any time during the continuance of the charter of said company to purchase the corporate property, and all the rights and privileges of said company, at such price as might be mutually agreed upon between said company and the City of

Gloucester, and that said company should be authorized to make sale of its said property, and all its rights and privileges, to said city, and that in case said company and said city should be unable to agree upon the compensation to be paid for the same, such compensation should be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award when accepted by the court, should be binding upon both parties, and that the authority to said city to purchase said franchise and property of said
99 company, was granted on condition that the same should be assented to by said city by a two-thirds vote of the voters present and voting thereon, at a meeting called for that purpose in the several wards of said city; and

Whereas, it is provided by section 16 of chapter 451 of the Acts of the Legislature of Massachusetts for the Year 1895, that if, within thirty days after said act shall have been accepted by the City of Gloucester, as therein provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester, in writing, that it desires to sell to said city all its corporate property and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have first purchased of said company the property aforesaid; and

Whereas, the City of Gloucester, at a legal meeting called for that purpose on the twenty-third day of July, 1895, duly voted to adopt said act; and

Whereas, the Gloucester Water Supply Company claims that, in the event of the purchase by said city of its franchise and property, said city is liable to pay therefor a just, reasonable and full compensation, and that if said chapter 451 of the Statutes of 1895 undertakes to authorize said city to acquire said franchise and property for less than the just, reasonable and full compensation therefor, such provision is unconstitutional and void;

Now, therefore, in compliance with section 16 of said chapter 451 of the Statutes of 1895, it is hereby—

Voted, that this company desires to sell to the said City of Gloucester all the corporate property, and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and that David W. Low, the clerk of said company, is hereby authorized and directed to notify the mayor of said city of Gloucester, in writing, that the company so desires to sell said property and franchises, and that David W. Low, clerk of said company, is hereby authorized and directed to sign and file

with the city clerk of said city a specification and description of all the property aforesaid.

Attest: DAVID W. LOW,
Clerk of the Gloucester Water Supply Company.

Filed Oct. 29, 1895.
(Signed) DEAN PEABODY, *Clerk.*

100 EXHIBIT N.

Supreme Judicial Court.

ESSEX, *ss:*

GLOUCESTER WATER SUPPLY COMPANY
v.
CITY OF GLOUCESTER.

The City of Gloucester, the respondent, moves that the report and award of the commissioners, filed June 29, 1900, be accepted, for reasons appearing upon the face thereof, as an award of the sum of three hundred and twenty-five thousand eight hundred and fifty dollars ($325,850), to be paid the petitioner by the respondent, or as an award of such sum, less than six hundred thousand five hundred dollars ($600,500), as law and justice may require.

And, in the alternative, the respondent moves that the report and award be recommitted to the commissioners, with directions to revise the same by disallowing the sum of $175,000 allowed and awarded the petitioner for water and water rights pertaining to the Dikes and Wallace reservoirs; the sum of $20,000 allowed and awarded for the Lily Pond water and water rights valued for the purpose of domestic supply; the sum of $4650 allowed and awarded for the Lily Pond water rights not valued as for domestic supply; and the sum of $75,000 allowed and awarded as the peculiar value of the property to, and for the purposes of its use by, the City of Gloucester, as enhanced by reason and in view of the business done or to be done by its use; to strike out the clause which attempts to award interest on the amount of the valuation; and to revise their award of fees for their services in the case; or with such other orders and directions as law and justice may require; on the ground that the commissioners erred in allowing and awarding the petitioner each and all of said sums; in attempting to deal with the question of interest on the award; in refusing to rule and proceed as requested by the respondent in its requests numbered 1 to 7 inclusive, 10, 11, and 13 annexed to the report; and in awarding the sum of $27,000 as their fees for their services in the case; and for other sufficient grounds and reasons.

(Signed) CITY OF GLOUCESTER,
By A. E. PILLSBURY,
CHAS. A. RUSSELL.

101 EXHIBIT O.

GLOUCESTER WATER SUPPLY CO.
v.
CITY OF GLOUCESTER.

LORING, *J.*:

1. The defendant's first contention is that in estimating the value of the Dikes and Wallace reservoirs the water company is not entitled to include the value of any water or water rights.

These two reservoirs formed the water supply which was in use on September 25, 1895, when the petitioner's plant was transferred to the defendant city. The water which feeds these reservoirs was obtained by digging out two swamps and damming up their outlets. No brook flowed into either swamp in its natural state, but the water collected in the reservoirs "gathers" there, coming from the water sheds of the neighboring land; both swamps were taken in 1884 by the water company, and written descriptions of their bounds were filed in the registry of deeds under St. 1881, c. 167, s. 3; in these descriptions it is stated among other things that "the above land, or real estate, has been taken, * * * for forming and erecting dams, reservoirs, to take and hold water for the purposes above set forth, * * * and such other use and purpose as may be necessary and may be authorized by said act."

We are of opinion that this was a valid taking of the water which "gathers" in the reservoirs. Where land is taken for a reservoir "to take and hold water," all water which "gathers" in the reservoir from springs or by percolation, and none of which flows into the reservoir from a stream, is also impliedly taken. In such a case, the requirements of an adverse taking of such water under the right of eminent domain are complied with.—See Glover *v.* Boston, 14 Gray, 282, 288; Kennison *v.* Arlington, 144 Mass. 456; Hollingsworth Co. *v.* Foxboro, 165 Mass. 186, 189; Lexington Print Works *v.* Canton, 167 Mass. 341, 344. Where a reservoir is fed by the waters of a brook which has been taken, in terms, by the water company, and is also fed by waters which "gathers" in the reservoir, as water gathers in a well, it would be impracticable to hold that the only water to which the company has a title was the water of the brook, and that it has no title to the water which gathered in the reservoir. Land cannot be used as a reservoir by a water company without the water company having a right to the water which "gathers" in the bottom of it by percolation or from springs.

We are therefore of opinion that in estimating the value of Dikes and Wallace reservoirs the water company is entitled to the value of the water which "gathers" there.

The objection originally taken by the defendant to the water company's title to the land on which the pumping-station stands was waived at the argument.

102 2. As to the waters of Lily pond.—We are of opinion, on the one hand, that the water company had no right to use these waters for domestic purposes, and therefore that $20,000. must be deducted from the amount of the award; but, on the other hand, we are of opinion that the water company did own the right to flow Lily pond and to use its waters for mill purposes, and therefore that the $4,650. allowed by the commissioners is not to be deducted from the amount of the award.

The only ground on which the water company claims the right to use these waters for domestic purposes is that for part of the year 1885–1886, while Dikes and Wallace reservoirs were being built, it used the waters of this pond in supplying the defendant city and its inhabitants with water. The water company contends that "the actual appropriation and diversion of the waters was sufficient to constitute a legal taking," and relies upon Moore *v.* Boston, 8 Cush. 274; Bailey *v.* Woburn, 126 Mass. 416; Cowdrey *v.* Woburn, 136 Mass. 409; and Northboro *v.* County Commissioners, 138 Mass. 263. In addition to these cases cited by the water company is the case of Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394. The defendant relies principally upon the decision in the case of Warren *v.* The Spencer Water Co., 143 Mass. 9, and upon the case of Hamor *v.* The Bar Harbor Water Co., 78 Maine, 127.

Whether the actual diversion of water is a legal taking of it, is a question on which the cases in this Commonwealth are not in entire harmony.

It seems to have been held in Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394, that the actual diversion of water was in that case a legal taking of it. It appears from the original papers in that case that a permanent dam had been built across the outlet of the pond whose waters were claimed by the plaintiff to have been tortiously used to his, the plaintiff's detriment, and a pumping-station had been built in connection with it; and it was stated in the bill of exceptions "that the operations of the company as aforesaid were under the assumed authority of said chapter, (St. 1867, s. 73,) and were necessary for the purpose of said act." In that case, there was no pretence that the defendant had passed any vote stating that the waters of the pond in question, or any part of them, had been taken. The act in question (St. 1867, c. 73) gave the defendant aqueduct company authority to take the waters of the pond and to enter upon and dig up any land through which it might decide to lay its pipes; but it did not require any description, either of the land or of the water rights taken by it, to be filed in the registry of deeds or elsewhere. It appears from the brief of the defendant in that case that there are many acts in this Commonwealth drawn like the act there in question. St. 1839, c. 114; St. 1845, c. 90; St. 1850, c. 192; St. 1850, c. 198; St. 1850, c. 273; St. 1852, c. 210; St. 1856, c. 241; St. 1857, c. 135 are all acts which, like 1867, c. 73, authorize the taking of water and land without stating in what the taking shall consist or requiring a description either of the land or of the water taken to be filed in the registry of deeds or elsewhere.

On the other hand, Warren *v.* The Spencer Water Company, 143 Mass. 9 seems to be a decision the other way. The statute
103 there in question (St. 1882, c. 119) authorized the water company to take the waters of any brook, and to take any real estate necessary for its use, and provided that the company "should cause to be recorded in the registry of deeds for the county of Worcester a description of any land so taken," but made no provision as to requiring, there or elsewhere, a description of the waters taken by the water company. The declaration in Warren *v.* The Spencer Water Company contained two counts; one for entering upon the plaintiff's land and laying pipes therein, and the second for deflecting the waters of a brook which had formerly flowed through her (the plaintiff's) pasture. The presiding judge ruled, with respect to the second count, that "the turning of the water of Shaw pond by the defendant's servants into its pipes, in the absence of any other act or proceeding of the corporation in relation thereto, was not such a taking of the water or of water rights, under the statute, as would preclude the plaintiff from maintaining an action of tort for the diversion of the waters from the brook running through her pasture;" and an exception to that ruling was overruled, although the question was not discussed in the opinion delivered by this court. And it is of some importance that there are many statutes like the statute in question in Warren *v.* The Spencer Water Co., which provide that the water company may take land and water, and then provide that if land is taken a description of it shall be filed in the registry of deeds, making no provision as to what must be done with respect to the taking of water taken by the water company under the act. Among such statutes are St. 1865, c. 132; St. 1866, c. 175; St. 1867, c. 84; St. 1867, c. 272; St. 1868, c. 182; St. 1871, c. 218; St. 1871, c. 30; St. 1872, c. 345; St. 1873, c. 242; St. 1874, c. 191; St. 1876, c. 42; St. 1880, c. 127; St. 1880, c. 179; St. 1880, c. 203; and St. 1882, c. 119 and c. 142.

And finally, in Moore *v.* Boston, there is a statement that the legal taking is the actual use of the property taken, as is shown by the fact that it is a description of a previous taking that is to be filed in the registry of deeds. The act in question in Moore *v.* Boston was not drawn like either of the two classes of acts already spoken of. That act (St. 1846, c. 167) authorized the defendant city to take water and land in order to supply its inhabitants with water, and provided.—"The city of Boston shall, within sixty days from the time they shall take any lands, or ponds, or streams of water, for the purposes of this act, file in the office of the registry of deeds, for the county where they are situate, a description of the lands, ponds, or streams of water so taken." A parcel of land belonging to the plaintiff's estate was actually used by the defendant city for the purpose of building an aqueduct passing through it, during her lifetime, and a description of the land so taken was filed in the registry of deeds after her death. It was held that the petition for compensation was properly brought by the administrator, and on the ground that the exercise of the physical dominion over the property which it was

claimed had been taken was the legal taking of that property. There is a similar statement in Northboro *v.* County Commissioners, 138 Mass., 263, in which it was held that a petition for damages
104 must be brought within one year after water has been actually diverted, under a statute which provides that the petition shall be brought "within one year after the taking of such land, water source, or water right, or other injury done as aforesaid, and not thereafter. No assessment for damage shall be made for the taking of any water right or any injury thereto until the water is actually withdrawn or diverted." The conclusion reached in that case puts the statute there in question on the same footing as the act in the case at bar (St. 1881, c. 167, s. 3), which is a common, if not a usual, form of limitation of such petitions. In the act in the case at bar, it is provided that the petition shall be brought "within three years from the time the water is actually withdrawn or diverted, and not thereafter."

Bailey *v.* Woburn, 126 Mass. 416, and Cowdrey *v.* Woburn, 136 Mass. 409, are cases where the owner of the land did not undertake to assert that his land had not been taken, but where he was seeking to obtain damages on the footing that it had been taken, and may well rest upon the ground that in such a case the water company or the defendant city is estopped to deny that there is no legal taking, even if there has been no legal taking. Spaulding *v.* Arlington, 126 Mass. 492, 494; Lewis *v.* Boston, 130 Mass. 339. And Moore *v.* Boston, 8 Cush. 274; *and Moore v. Boston, 8 Cush. 274;* and Northboro *v.* County Commissioners, 138 Mass. 263, 255, are also cases where the owner of the land was seeking to obtain compensation on the footing that his property had been taken, and are not cases where he was asserting his right to his property as still his own, in spite of what had been done by the defendant city or company, and therefore are not cases which are decisive of the question whether a man can be deprived of his property by an act *in pais*, unaccompanied by a writing or other declaration defining the measure of interference with his ownership of the property which it is claimed has been taken under the exercise of the right of eminent domain; see Glover *v.* Boston, 14 Grey, 282, 288; Kennison *v.* Arlington, 144 Mass. 456; Hollingsworth Co. *v.* Foxboro, 165 Mass. 186, 189; and Lexington Print Works *v.* Canton, 167 Mass. 341, 344.

In connection with Moore *v.* Boston and Northboro *v.* County Commissioners, which was decided on the authority of Moore *v.* Boston, it is important to note that the case of Davidson *v.* Boston & Maine R. R. Co., 3 Cush. 91, on which the decision in Moore *v.* Boston was largely based, is a case which was subsequently explained to be a case resting on the doctrine of estoppel; that is to say, a case in which the defendant Railroad Co., having used the plaintiff's land, was estopped to say that it had not taken his land, when the use it had made of it could only be justified by it if it had, in fact, taken his land. To that effect, see Shaw, C. J. in Boston & Providence R. R. *v.* Midland R. R., 1 Gray, 340, 361; see also Drury *v.* Midland R. R., 127 Mass. 571, 580. Moreover, it is well settled, in case a rail-

road constructs its roadbed on the land of the plaintiff, that the plaintiff may, at his election, assert his title to his land and to the rails affixed to it by the railroad; Meriam *v.* Brown, 128 Mass. 391; or he may at his election bring a petition for compensation
105 on the ground that the defendant is estopped to say that the land has not been taken. Boston & Providence R. R. *v.* Midland R. R., 1 Gray, 340, 361; Drury *v.* Midland R. R., 127 Mass. 571, 580. In the case of a railroad, the filing of the location is the act of taking; Charlestown R. R. *v.* County Commrs. 7 Met. 78; Hazen *v.* Boston & Maine R. R., 2 Gray, 574, 580; Chandler *v.* Jamaica Pond Aqueduct Corp., 114 Mass. 575, 577. Finally in Saunders *v.* Lowell, 131 Mass. 387, 388, Moore *v.* Boston is treated as a case resting on this doctrine of estoppel.

It is not necessary in this case to decide the abstract question which we have been discussing. However that question may be decided, we are of opinion that such an equivocal act as the temporary use of water for less than a year, which use is then abandoned and has never since been resumed, is not a legal taking of that water under St. 1881, c. 167, s. 2, as against a person who has rights in the water in question and who had not elected to treat it as a taking of it; The defendant city in objecting to the title of the water company to the waters of Lily pond has a right to test its title by the question whether the rights of such a person have been extinguished.

For these reasons we are of opinion that the $20,000 allowed as the value of the waters of Lily pond for domestic purposes must be deducted from the amount of the award.

But we are of opinion that the $4650. allowed for the value of the right to use the waters of Lily pond for a mill privilege must stand.

The defendant city contends that the mill privilege which was conveyed to the water company by the Webster Company deed had been previously extinguished by abandonment; it bases this claim on the fact that in 1873 a fire destroyed the saw mill and the net and twine mill then built at the mill pond, and that no use was made of the waters of Lily pond after that until they were temporarily used by the water company in supplying the defendant city and its inhabitants with water during a part of the year 1885 to 1886, while Dikes and Wallace reservoirs were being constructed. The defendant also contends that under its charter the water company could not acquire title to any land or water rights by purchase, and could not acquire a mill privilege at all; and finally, that under the terms of the original grant in 1682, a fee did not pass in the easement thereby created, but only a life estate. But we are of opinion that the mill privilege has not been extinguished by abandonment; the easement was created by grant, and in such a case it is not lost by non user. Butterfield *v.* Reid, 160 Mass. 361, 369. The cases of French *v.* Braintree Mfg. Co., 23 Pick. 216; Fitch *v.* Stevens, 4 Met. 426; Hodges *v.* Hodges, 5 Met. 205, were cases involving a right to maintain a dam under the mill acts and rest on other principles. The right of the water company to acquire land or water rights by purchase is plain; it is recognized in the

third section of its charter. And we are of opinion, that, as an incident to its business of securing and selling water, it could purchase and hold this privilege of damming the waters and flooding the Lily Pond meadow, although the running of a mill was beyond its charter powers; Brown *v.* Winnisimmet Co., 11 Allen, 326. And further, that although no words of inheritance were used in the original grant by the town of Gloucester "to Jacob Davis &
106 others joyninge with him," made in 1682, a fee in the easement passed to the grantees; it is well-settled that the rigid rules of construction which are applicable to modern conveyances are not to be applied to transactions of the kind in question which took place early after the settlement of the country; when conveyancing was little understood. Adams *v.* Frothingham, 3 Mass. 352; Stoughton *v.* Baker, 4 Mass. 521. Feofees of Grammar School *v.* Andrews, 8 Met. 584, 592; Green *v.* Putnam, 8 Cush. 21, 25. For the same reason, the easement granted was not limited to damming the waters of the stream for the purpose of running a saw mill; Adams *v.* Frothingham, 3 Mass. 352. But the ownership of the mill privileges did not give the water company the right to withdraw all the water that collects in Lily pond and sell it to the defendant city and its inhabitants, and for that reason, the $20,000 allowed by the commissioners must be deducted as we have already stated.

The defendant further contends that the $4650. allowed by the commissioners must be deducted from the award because the waters of Lily pond were not in actual use when the property of the water company was transferred to the city, because the title to use the waters of Lily pond as a part of the mill privilege in the waters of Little river does not confer a perfect title to the waters of Lily pond upon the city, and finally because the waters of that pond can not be made fit for the purposes of a domestic water supply without acquiring the fee in the bottom of the pond. But it is plain that the city has the power to acquire the fee in the bottom of the pond, and it is also plain that the waters of Lily pond had been used in furnishing the defendant city and its inhabitants with water in 1885 and 1886, and that without the ownership of the mill privilege in Little river these waters could not have been so used. The mill privilege is of value as a step towards the ownership of the waters of Lily pond as an auxiliary supply, and those waters having once been used by the water company in supplying the defendant city and its inhabitants with water, the mill privilege is the property of the water company, owned and used within St. 1895, c. 451, s. 16.

3. It will be convenient to consider the defendant's contention that the commissioners had no right to award the $75,000 allowed by them in addition to the cost of reproduction of the water company's plant, less depreciation, in connection with the water company's contention that evidence of past earnings of the water company should have been admitted in evidence.

The act under which the award was made (St. 1895, c. 145) is an act enabling the City of Gloucester to "supply itself and its inhab-

itants with water." By section 16 of that act, that right is made conditional on its (the city's) purchasing the property of the water company in case the water company elects to sell its property to the city; in case the city agrees to buy the water company's property, under an offer from the water Co. made under the provisions of that section, it is provided that "said city shall pay to said company the fair value thereof;" "such value shall be estimated without enhancement on account of future earning capacity or future good will or on account of the franchise of said company."

107 In determining the true construction of these provisions of s. 16, it is important to bear in mind the purpose which the legislature had in making the right of the city to supply itself with water conditional on its buying the company's property in case the company elected to sell it to the city; and in providing that in ascertaining the "fair value" of that property, it should not be enhanced "on account of either future earning capacity or future good-will, or on account of the franchise of said company."

On the one hand, it is plain that a private water company organized for net profits cannot hope to compete with a city, which can rely upon taxes to supply a deficit in operating expenses. For that reason, it is also plain that if the legislature had not required the city to buy the water company's property, the company's property would have been practically, though not legally, confiscated. No doubt, therefore, can arise as to the reasons for the insertion of the clause in s. 16 providing that the value shall not be enhanced "on account of the franchise of said company." The franchise of the Gloucester Water Supply Company was not an exclusive franchise. The grant of a similar franchise to the city of Gloucester to supply itself and its inhabitants with water was not a violation of the franchise rights of the Gloucester Water Supply Company; and finally, the sale to the city was not obligatory on the water company; the company was given the option of selling its property to the city or of going on in competition with the city, under the act in question. Under these circumstances, it is plain that the value of the company's property which the city is compelled to buy ought not to be enhanced "on account of the franchise of said company."

It is also plain, so long as a water company has no competitor in supplying a town or city with water, it is practically in the enjoyment of an exclusive franchise, although its franchise is not legally an exclusive one. For that reason, the earnings of this company were not evidence of the "fair value" of this property; the earnings of a company which is in the enjoyment of what is practically an exclusive franchise are not a fair criterion of the "fair value" of the property, apart from an exclusive franchise. For that reason, we are of opinion that the evidence of past earnings offered by the water company *were* properly excluded. Newburyport Water Co. *v.* Newburyport, 168 Mass. 541.

It is argued by the petitioner that the admissibility of such evidence derives support from St. 1891, c. 390, s. 12, which provides that in determining the "fair market value" of a gas or electric

plant under similar circumstances "the earning capacity of such plant, based upon the actual earnings being derived from such use at the time of the final vote of such city or town to establish a plant" is to be included "as an element of value;" but this clause as to the earning capacity being considered as an element of value was omitted from the act in question.

The only doubt as to the propriety of the allowance of a sum in addition to the cost of duplication, less depreciation, of the water company's plant is whether the principles on which the commissioners proceeded was sufficiently favorable to the water company.

It is plain that the real commercial market value of the water company is, or may be, in fact, greater than "the cost of re-
108 production, less depreciation, of the different features of the physical plant." Take, for example, a manufacturing plant. Suppose one manufacturing plant has been established for some ten years and is doing a good business and is sold as a going concern. It will sell for more on the market than a similar plant reproduced physically would sell for immediately on its completion, before it had acquired any business. National Water Works *v.* Kansas City, 62 Fed. Rep. 853.

We think it is plain that there is nothing in the provisions of s. 16 of the act in question (St. 1881, c. 167) forbidding the commissioners considering this element of value which (as we have seen) in fact exists. The provisions of the act are that the "fair value" "shall be estimated without enhancement on account of future earning capacity or future good will, or on account of the franchise of said company." Whether that would allow present earning capacity and present good-will apart from the franchise, to be taken into account, as distinguished from future earning capacity and future good-will, need not be considered. It is plain that the element of value which comes from the fact that the property is sold as a going concern, in which case it has, or may have, in fact, a greater market value than the same property reproduced in its physical features is not excluded from consideration by that provision of the statute.

It is also plain that the commissioners, in allowing the $75,000, allowed by them in addition to the cost of reproduction, less depreciation, of the plant in its physical features did not go beyond this. They state that in their opinion "the cost of duplication, less depreciation, of the different features of the physical plant * * * does not represent a fair valuation of this plant, welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby, so that the city, in purchasing it, without considering its income or right to do business but having the power to carry it on on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a valuation that we have found to be seventy-five thousand dollars ($75,000) that has been imported into the plant, which seems to us as much a part of the property valuation as any other part of it."

4. We are of opinion that the commissioners could properly

adopt, as a basis of their valuation, the value of the property at the date of its transfer to the city, adding interest to the date of payment.

5. The objection made by the defendant to the reasonableness of the fees charged by the commissioners must be raised before a single justice of this court.

6. The right to have the report recommitted because the company had a right to take additional sources of water supply in ward eight, to lay and maintain pipes in the streets, and to charge water rates, was not raised in the commissioners' report, nor is it mentioned in the motion to recommit that report, and therefore it is not
109 open, under the terms of the report reserving the case for this court; but we think that the water company got all the advantage to which it was entitled by its authority to take additional sources of water supply; the commissioners found that "the failure to take and create property by the exercise of its franchise rights gives nothing that we can appraise under the statute. We, however, permitted the petitioner's experts to take into consideration the effect upon the value, if any, of the water rights owned by the company by the presence of these additional supplies. We did not, after considering the amount of the available water supply of the company in 1895, enhance the value of its supply on account of the presence of the supplementary sources, but the fact that they could be so employed prevented any impairment under any claim that the company's sources would be shortly exhausted, and therefore likely to be abandoned."

Apart from these considerations, we think the commissioners were correct in not considering these rights of the water company; these rights could be revoked, and were revoked by St. 1895, c. 451.

It follows that the following sums are to be deducted from the total award made by the commissioners.—(1) $20,000 for water rights in Lily pond; (2) $3,955.40, an amount agreed upon between the parties. The report of the commissioners should be affirmed as a report for $576,544.60, with interest from September 24, 1895; but the case is to stand for hearing on the amount to which the petitioner is entitled by its payment of the costs charged by the commissioners.

So ordered.

110 At the same term the following demurrer was filed:

Demurrer.

(Filed Sept. 3, 1901.)

The City of Gloucester, defendant in the above entitled cause, demurs to the plaintiff's bill and assigns as grounds of demurrer the following:

First. The bill does not set forth or show a case arising under the

Constitution or laws of the United States of which this court has or can take jurisdiction to administer any relief to the plaintiff; in that it does not appear by the bill that the State of Massachusetts has passed any law impairing the obligation of any contract of the plaintiff, or that there has been any taking of any property of the plaintiff or that said State has deprived the plaintiff of its property without due process of law, or has denied to the plaintiff or its stockholders the equal protection of the laws, or that any right of the plaintiff existing or arising under the Constitution or laws of the United States has been denied or infringed by the State of Massachusetts, or by the defendant under its authority, or otherwise.

Second. It appears by the bill that any right of the plaintiff existing or arising under the Constitution or laws of the United States in or concerning the proceedings under the Massachusetts statute chapter 451 of the Acts of 1895 set forth in the bill, could have been claimed and asserted with full effect in such proceedings; and that the laches and delay of the plaintiff in failing seasonably to claim or assert the same is a bar to any right now to assert or enforce the same in or by means of this proceeding.

111 Third. It appears by the bill that the same is an attempt to review and revise in this court certain proceedings between the plaintiff and the defendant under said Massachusetts statute of 1895 and in the supreme judicial court of the State of Massachusetts, which court had jurisdiction thereof, and to avoid the results thereof; which proceedings, as appears by the bill, were voluntary in law on the part of the plaintiff and were and are lawful, valid and binding upon the plaintiff, and cannot be reviewed, reversed or avoided in this court under the circumstances disclosed in the bill; and the plaintiff by its voluntary acts and conduct, as therein disclosed, is estopped to deny or question the validity thereof.

Fourth. The bill does not set forth or show a case entitling the plaintiff to any relief in equity against the defendant.

Wherefore, and for other good causes of demurrer appearing therein, the defendant demurs to the plaintiff's bill and prays the judgment of the court whether it ought to be held to make further answer thereto.

CITY OF GLOUCESTER,
By A. E. PILLSBURY,
Solicitor and of Counsel.

I certify that in my opinion the foregoing demurrer is well founded in point of law.

A. E. PILLSBURY,
Of Counsel for the Defendant.

112 UNITED STATES OF AMERICA, }
District of Massachusetts. }

BOSTON, *September 3d*, 1901.

I, Albert E. Pillsbury, in behalf of The City of Gloucester, defendant in the above entitled cause, on oath say that the foregoing demurrer is not interposed for delay.

ALBERT E. PILLSBURY.

Subscribed and sworn to before me
[SEAL.] CHAS. C. BUCKNAM,
Notary Public.

This cause was thence continued from time to time to the present May term, A. D. 1902, when the same is set down for hearing and fully heard by the court, on demurrer, the Honorable Le Baron B. Colt, circuit judge, sitting, and, after due consideration thereof had the following rescript is filed:

Rescript.

June 23, 1902.

COLT, *J.*:

This case, in our opinion, is governed by the case of The Newburyport Water Company *v.* City of Newburyport and the demurrer to the bill is therefore sustained.

On the thirtieth day of September, A. D. 1902, the following agreement to amend record is filed:

Agreement to Amend Record.

(Filed Sept. 30, 1902.)

It is agreed that the vote of the city of Gloucester to purchase the plaintiff's property, referred to in paragraph 15 of the plaintiff's bill, was in the form hereto annexed; and that on Sept. 5, 1895,
113 the city council of the defendant city passed an order in the form hereto annexed, of which a copy was served on the plaintiff company September 7th, as appears by the certificate thereto annexed; and that said form of vote and order shall be incorporated into the record, with the same effect as though they had been originally set out in the plaintiff's bill.

ROBERT M. MORSE,
For the Plaintiff.
A. E. PILLSBURY,
For the Defendant.

Special Election Tuesday, Sept. 24, 1895, *on Purchase of Water Plant.*

Meetings of the legal voters in the city of Gloucester were held in the several precincts of the city on Tuesday the twentyfourth day of September, A. D. 1895, called by warrants of the mayor and aldermen, to give in their votes for or against, in answer to the following question, namely: "Shall the City of Gloucester purchase all the corporate property and all the rights, privileges, easements, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by the Gloucester Water Supply Company, and used in supplying said city and the inhabitants thereof with water, under and in accordance with the provisions of section 16, chapter 451 of the Acts of 1895?".

The returns of the several precinct officers were examined at a meeting of the board of aldermen held on Friday, September 27, 1895, and were as follows, namely:

Yes, 1073,
No, 116,
Blanks, 2.

A true copy of the returns as recorded in record of elections, vol. 2, page 45.

Attest: JOHN J. SOMES, *City Clerk.*

From city clerk's office.

114 IN BOARD OF ALDERMEN, *Sept.* 5, 1895.

Ordered—that his honor, the mayor notify the Gloucester Water Supply Company by communicating to it a copy of this order—that the City of Gloucester does not admit the correctness of the description of the property of the company dated and filed with the city clerk, August 15th, 1895, as a description of the property, which the company is authorized to sell and the city to purchase under and according to the provisions of section sixteen of chapter 451 of the Acts of the Legislature of the Year 1895, and does not consent to be bound thereby, or otherwise affected by such description; and that the inhabitants of the city have the right to vote and will be called upon to vote under section 16 of said act, upon the purchase of the property of the company described in said section under and according to the terms and provisions of said act, and not otherwise.

(Signed) THOMAS J. CARROLL.

In board of aldermen, Sept. 5, 1895.
Adopted. Sent down for concurrence.
(Signed) JOHN J. SOMES, *Clerk.*

In common council, Sept. 5, 1895.
Adopted in concurrence.
(Signed) A. F. STICKNEY, *Clerk.*

Approved, Sept. 6, 1895.
(Signed) BENJ. F. COOK, *Mayor.*

A true copy:
Attest: JOHN J. SOMES, *City Clerk.*

From city clerk's office.

115 MAYOR'S OFFICE,
CITY HALL, GLOUCESTER, MASS., *September* 6, 1895.

To the Gloucester Water Supply Company:

In compliance with an order adopted by the city council of the city of Gloucester Sept. 5th, 1895, approved Sept. 6, 1895, a copy of which said order is hereto annexed and made a part hereof, the Gloucester Water Supply Company is hereby notified that the City of Gloucester does not admit the correctness of the description of the property of the company dated and filed with the city clerk August 15th, 1895, as a description of the property which the company is authorized to sell and the city to purchase under and according to the provisions of section sixteen, of chapter 451 of the Acts of the Legislature of the Year 1895, and does not consent to be bound thereby, or otherwise affected by such description; and that the inhabitants of the city have the right to vote and will be called upon to vote under section 16 of said act, upon the purchase of the property of the company described in said section under and according to the terms and provisions of said act and not otherwise.

Very respectfully yours,
(Signed) BENJ. F. COOK,
Mayor of the City of Gloucester.

116 IN BOARD OF ALDERMEN,
GLOUCESTER, MASS., *Sept.* 5, 1895.

Ordered: That his honor the mayor notify the Gloucester Water Supply Company by communicating to it a copy of this order, that the City of Gloucester does not admit the correctness of the description of the property of the company dated and filed with the city clerk August 15th, 1895, as a description of the property which the company is authorized to sell and the city to purchase under and according to the provisions of section sixteen of chapter 451 of the Acts of the Legislature of the Year 1895, and does not consent to be bound thereby or otherwise affected by such description; and that the inhabitants of the city have the right to vote and will be called upon to vote under section 16 of said act, upon the purchase of the property of the company described in said section under and according to the terms and provisions of said act and not otherwise.

In board of aldermen, Sept. 5, 1895.
Adopted: Sent down for concurrence.
(Signed) JOHN J. SOMES, *Clerk.*

In common council, Sept. 5, 1895.
Adopted in concurrence.
(Signed) A. F. STICKNEY, *Clerk.*

Approved Sept. 6, 1895.
(Signed) BENJ. F. COOK, *Mayor.*

A true copy of the order as adopted by the city council Sept. 5, 1895.
Attest:
(Signed) JOHN J. SOMES, *City Clerk.*

117 ESSEX, *ss:*

GLOUCESTER, *September 7th*, 1895.

I this day served the within notice and order upon the within named Gloucester Water Supply Company by giving in hand to David W. Low, clerk of said Gloucester Water Supply Company, an attested copy of said notice and of the copy of the order to the same annexed, and by giving a like attested copy of said notice and of the copy of the order to the same annexed to Joseph O. Proctor, president of said Gloucester Water Supply Company.
(Signed) WILLIAM CRONIN,
Deputy Sheriff.

A true copy:
Attest: JOHN J. SOMES, *City Clerk.*

From city clerk's office.

118 On the first day of October, A. D. 1902, the following final decree is entered:

Final Decree.

Oct. 1, 1902.

COLT, *J.:*

This cause came on to be further heard at this term, and was argued by counsel, and thereupon, on consideration thereof, it is ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.
By the court:

BENJ. H. BRADLEE,
Deputy Clerk.

From the final decree the complainant claims an appeal to the Supreme Court of the United States and gives good and sufficient security that it will prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, and said appeal is allowed.
A true record.
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

The following are the opinions of the circuit court filed in the case No. 924, equity, Newburyport Water Company *v.* City of Newburyport, by which case the court held in the rescript filed herein June 23, 1902, that the present case is governed:

119 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Opinion of the Court, February 24, 1898.

COLT, *J.*:

The present hearing was had on demurrer to the bill of complaint. The principal question raised by the bill is whether the Massachusetts act of 1894 (chapter 474), as construed by the State court, is in violation of the fourteenth amendment of the Constitution of the United States.

That act, as interpreted by the State court, allowed the complainant no compensation for the value of its franchises or on account of its future earning capacity or good-will.

The demurrer assumes the truth of the allegations contained in the bill, which are properly pleaded, and we will only refer to such as we deem material.

It appears from the bill that the water company was duly incorporated under the Massachusetts Statutes of 1880, chapter 235, for the purpose of furnishing the city of Newburyport with water, and that it conducted its business until January 29, 1895.

Section 11 of its charter provided that the city should have the right at any time after ten years from the date of the completion of the water works to purchase the property, and all the rights and privileges of the company, at such price as might be mutu-
120 ally agreed upon, and, in case the water company and the city were unable to agree, the compensation was to be determined by three commissioners to be appointed by the State court. The city did not avail itself of the right to purchase under this act.

In 1893 the legislature passed an act which authorized the city of Newburyport to supply itself with water. Stat. 1893, chapter 471.

By section 12 of that act it was provided that at any time within sixty days after the passage of the act the water company might notify the mayor of Newburyport in writing that it desired to sell to the city its corporate property, and all the rights and privileges of the company, and to execute and deliver to the city proper deeds and instruments in writing, conveying to said city the property aforesaid: "Provided, however, the legal voters of the city of Newburyport, at legal meetings to be called in the several wards of said city

within six months after said notification has been received as aforesaid, shall, by a majority vote of the voters of said city present and voting thereon at said meetings, vote to purchase the aforesaid property upon the terms and conditions contained in this section, whereupon the property thus conveyed shall become the property of the City of Newburyport, and said city shall be liable to pay to said company the fair value of the property thus conveyed." Section 13 provided that "after the vote provided for in section 12 of this act, or provided the Newburyport Water Company does not so notify the said mayor within the sixty days, this act shall be submitted to the legal voters of the city of Newburyport for their acceptance or rejection, at legal meetings to be called in the several wards of said city within eight months from the passage of this act, and shall take effect from and after its acceptance by a two-thirds vote of the voters of said city present and voting thereon at said meetings."

Within sixty days after the passage of this act the water company notified the city of its desire to sell under the provisions of the act. On August 25, 1893, the city by a majority vote declined to purchase the property; but on September 7, 1893, voted the acceptance of chapter 471 of the act of 1893, authorizing it to build new water works.

121 The act of 1894 (Stat. 1894, chap. 474) provided that within thirty days after the passage of the act the water company should notify the mayor of the city of Newburyport in writing, that it desired to sell to the city "all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter 471 of the Acts of the Year 1893, unless it shall have first purchased of said company the property aforesaid, and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same." The act further provides for a meeting of the legal voters to vote upon the question of purchase, and that if the city shall vote to purchase, the water company shall execute and deliver to the city proper deeds and instruments in writing "conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided." And further, that in case the city and water company should be unable to agree upon the value of said property, the supreme judicial court shall appoint three commissioners to determine the fair value of said property for the purposes of its use by said city, and whose award when accepted by the court shall be final. "Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company."

Within thirty days after the passage of this statute, a meeting of

the stockholders of the water company was held, and a vote was adopted, to the effect that the company desired to sell to the city the property described in the statute, and notice of said vote was on the same day sent to the city, and on January 15, 1895, a majority of the legal voters of said city voted to purchase the property of the water company, and on January 29, 1895, the water company conveyed its corporeal property to the city, and in paragraph 26 of its deed it purported to convey "all the rights, privileges and easements heretofore acquired under chapter 235 of the Acts of the Legislature of Massachusetts for the Year 1880, and now used by said com-
122 pany, of laying and maintaining water pipes and mains in said streets, and of making connections therewith for the purpose of supplying said city and the inhabitants thereof with water, and all property, property rights, corporate property, privileges, easements, waters and water rights of said company, whether herein particularly described or not, and all the rights and franchises of said company, whether for supplying water to the city of Newburyport and the inhabitants thereof, and of collecting water rates therefor, or otherwise, hereby conveying to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water."

On January 31, 1895, the city took possession of the property of the water company, and as the water company and the city were unable to agree upon the price to be paid for the property, the water company on February 7, 1895, petitioned the court for the appointment of commissioners under the act of 1894. The commissioners were duly appointed and their report made February 3, 1897, showed that in their view the statute of 1894 excluded from their consideration any valuation of the franchise right of the company, or of its future earning capacity or good will.

The questions of law were reserved and argued before the full court, and on June 14, 1897, the court rendered an opinion holding that the decision of the commissioners was correct, and that under the act of 1894 the city was not required to pay the water company anything for its franchises, future earning capacity or good-will.

Subsequently the water company petitioned for a rehearing in the State court.

The bill alleges that the value of the rights of the water company which were excluded by the commissioners amounted to $475,000, and that the State court held they were properly so excluded under the act of 1894.

The bill further avers that after the passage of the act of 1893, permitting the city to build competing water works, the water company petitioned the legislature that the City of Newburyport should, before supplying its inhabitants with water, purchase "the
123 franchise, corporate property and all the rights and privileges of said Newburyport Water Company." As a result of this petition the legislature passed the act of 1894.

The bill further avers that the action of the water commissioners under the act of 1894 resulted in the deed of January 29, 1895, and that such conveyance by the water company "was voluntary in name and form only, and was in fact compulsory; and that said offer of sale and deed were made by said company to said City of Newburyport 'under the threat of municipal competition' by said city, and to avoid the ruin which would have resulted from such competition by said city; and that the said acts by which said city came into and obtained possession of the property described in said deed constituted a taking of such property in violation of the rights secured to plaintiff by the Constitution of the United States."

The bill (among other things) prays that chapter 474 of the act of 1894 may be decreed to be unconstitutional, and the deed cancelled and the property received thereunder restored to the complainant, or if the defendant is permitted to retain the property upon paying to the complainant just compensation for the entire property, the amount of compensation may be ascertained and the defendant be ordered to pay to the complainant the amount thereof.

The defendant demurs to the bill for want of jurisdiction, want of equity and on other grounds.

It is contended that on the face of the bill this is an attempt to review and retry here a case between the same parties already tried and determined in the State court.

The answer to this is that the constitutional questions set out in this bill were not raised in the State court and could not have been drawn in question in that suit.

Moore v. Sanford, 151 Mass., 285.
Pitkin v. Springfield, 112 Mass., 509.

In *Moore v. Sanford*, the plaintiffs, in 1885, filed a petition under the statute for damages sustained by the taking of their lands, and in 1889 brought a bill in equity to test the constitutionality of the statute, and to set aside the taking as unconstitutional. In holding
124 that the plaintiffs had a right, by an independent proceeding, to dispute the validity of the taking and the constitutionality of the act, the court said:

"The plaintiffs were entitled to have the question of the constitutionality of the statute determined, and under their petition for damages they were, by necessary inference, compelled in that proceeding to admit that it was constitutional."

If the question of the constitutionality of the act of 1894 was not open to the complainant in the proceeding in the State court, the objection that the complainant should have raised the question in that suit falls to the ground, and constitutes no defence to the present bill.

Nor do we think that the complainant is chargeable with such laches as to bar its right to bring this bill.

The bill was brought before the suit in the State court was finally determined, and before the acceptance by the complainant of the award.

Moore v. Sanford, ubi supra.

The fundamental question raised by the demurrer is whether the bill sets out a cause of equitable relief, or a "taking" of the complainant's property without "due process of law" or just compensation, in violation of the fourteenth amendment of the Constitution of the United States.

The bill alleges that the deed of the water company to the city under the act of 1894 was voluntary in name and form only, and was in fact compulsory, and was made under threat of competition by the city and to avoid the ruin which would have resulted from such competition, and that this constituted a "taking" in violation of a constitutional right.

We must assume, for the purpose of this demurrer, that the complainant took advantage of the act of 1894, under a threat of competition by the city which would have been ruinous to its property, and that its subsequent acts and conduct resulted from such threat. It further appears that under the construction given to the act of 1894 by the State court no compensation was allowed the complainant for its franchise rights, future earning capacity, or goodwill.

In *Swift Co v. United States*, 111 U. S., 22, a payment made to a public officer in discharge of a fee or tax illegally exacted is
125 not such a voluntary payment as will preclude the party from recovering it back. The court said:

"The question is, whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*."

In *Robertson v. Frank Bros. Co.*, 132 U. S. 17, it was held that the payment of money to a customs official, to avoid an onerous penalty, though the imposition of that penalty may have been illegal, is sufficient to make the payment an involuntary one.

The court, speaking through Mr. Justice Bradley, said:

"It was contended by the counsel for the Government at the trial, and is contended here, that the payment of the duties complained of was a voluntary payment, inasmuch as the plaintiffs themselves made the additions to the entries and invoices, and that, therefore, they cannot recover back any part of the money so paid; and they requested the court below to instruct the jury to render a verdict for the defendant. This the court refused to do; and left it to the jury to decide, upon the evidence, whether the making of the additions was a voluntary act on the part of the plaintiffs, or done under constraint in view of the penalty sure to be imposed in case it was not done."

In *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226, it was held that a judgment of a State court, even if authorized by statute, whereby private property is taken for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the Constitution of the United States; and that the defendant has been deprived of property without due process of law is not entirely met by the suggestion that he had due notice of the proceedings for condemnation, appeared, and was admitted to make defence.

Demurrer overruled.

126 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Before Colt and Brown, JJ.

Opinion of the Court, August 8, 1900.

COLT, *J.:*

Under the stipulation of counsel and order of court, the single question now presented is whether the plaintiff has been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States; all other questions as to the plaintiff's relief under its bill, including the question of valuation of the property alleged to have been taken, are to await the determination of the constitutional question.

The plaintiff, The Newburyport Water Company, was chartered by the State of Massachusetts in 1880, to supply the city of Newburyport and its inhabitants with water (Mass. St. of 1880, ch. 235). The company thereupon constructed a system of water works and proceeded to supply the city and its inhabitants with water. In 1893 the city petitioned the legislature for authority to build its own waterworks.

Notwithstanding the opposition of the company, the legislature passed the act of June 10, 1893, (Mass. St. of 1893, ch. 471)
127 authorizing the city to establish waterworks. After the vote by the city upon the acceptance of the act, the counsel for the city claimed and advised that the city had the right to supply itself and its inhabitants with water.

Thereupon, the company applied to the legislature to have the city required to purchase its waterworks before it proceeded to supply itself and its inhabitants with water. The application resulted in the passage of the act of June 14, 1894 (Mass. St. of 1894, ch. 474).

This act provided that the city should not proceed to build water works under the act of 1893 unless it should first purchase the company's property which it might do by a majority vote; and that, the city having so voted, the company should within twenty days execute and deliver to the city proper deeds conveying its property; that the property conveyed should thereupon become the property of the city, and that the city should pay to the company the fair value thereof, which if not agreed upon, should be determined by three commissioners appointed by the supreme judicial court, who should determine the fair value of the property "for the purposes of its use by said city," and "without enhancement on account of future earning capacity or good will, or on account of the franchise of said company."

The city voted to purchase; and, on January 29, 1895, the company executed and delivered to the city a duly authorized deed of all its property and franchise rights. The city took possession of the property and has ever since managed and operated it.

After the conveyance, commissioners were appointed, and on February 3, 1897, they filed in the State court their award. Questions of law arising on the award were reserved by a single justice for the full court, and on June 14, 1897, that court made an order sustaining the action of the commissioners. The commissioners estimated the value of the company's property for the purposes of its use by the city, and excluded from such valuation its future earning capacity, good will, and its right to the use of the streets and to collect water rates.

In order to sustain the contention that the plaintiff has been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States, it is necessary to show, as the plaintiff declares in its brief:

1. That the plaintiff's property was taken for public uses.

128 2. That the property was taken under color of the authority of a State.

3. That the taking was without just compensation.

The plaintiff bases the taking of its property upon the legislative threat to authorize municipal competition, whereby its deed to the city became voluntary only in form while in fact it was compulsory. This threatened competition, it is claimed, forced the plaintiff, against its will, to convey its property to the city for an insufficient consideration, and made the deed in effect a *taking* of property without just compensation under color of legislative authority.

The proposition here advanced requires a somewhat extended examination of the acts of 1893 and 1894 and their general bearing upon the single issue before us.

At the outset, it may be observed, that if the plaintiff establish a *taking* of its property, under the acts of 1893 and 1894, it is clearly right in its contention that such taking was without just compensation. The act of 1894 provided that the valuation of the property should be "the fair value of said property for the purposes of its use by said city," and "such value shall be estimated without enhance-

ment on account of future earning capacity or good will, or on account of the franchise of said company." A *taking* under an act providing such a method of compensation would be unconstitutional because without just compensation. It would be a taking "without due process of law" in violation of the fourteenth amendment.

Where private property is taken for public uses, the legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules and principles upon which it shall be computed. Lewis on Eminent Domain, sec. 461. When a taking has been ordered, the question of compensation is judicial, not legislative. The legislature cannot extinguish any part of such compensation, or in any manner "interfere with the just powers and province of courts and juries to administer rights and justice."

It is sufficient on this point to cite the language of the Supreme Court in two cases. In *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, the court said:

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—
129 that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 571, Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: *Commonwealth v. Pittsburgh & Connellsville Railroad*, 58 Penn. St. 26, 50; *Penn. Railroad v. Balt. & Ohio Railroad*, 60 Maryland, 263; *Isom v. Mississippi Central Railroad*, 36 Mississippi, 300. In the last of these cases, and on page 315, will be found these observations of the court: 'The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our

Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.' We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 409, 410, the court observed:

"If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature?"

We have to ascertain then, in order to dispose of the question before us, whether there was a *taking* of the plaintiff's property (the term "property," including franchise rights) by or under the acts of 1893 and 1894.

The *taking* complained of in this case was by right of
130 eminent domain, and not under the guise of taxation or police regulation. Eminent domain "embraces all cases where, by authority of the State and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use." Lewis on Eminent Domain, sec. 1.

Where the State grants a franchise to a corporation, and subsequently grants a similar franchise to another corporation, the question of a *taking* may be considered from three points of view. Where the first grant is not exclusive, the subsequent grant is not a taking which entitles the owner of the first franchise to compensation. Where the first grant is exclusive, the grant of a rival franchise is a taking, and just compensation must be made. Where the first grant is exclusive, the grant of a similar franchise does not constitute a taking requiring compensation, when the State, by its constitution or statute law, has reserved to itself the power to repeal, alter, or amend charters granted by the legislature. Such reservation becomes a part of the charter of every corporation. Shortly stated, the grant by the State of a competing franchise does not constitute a taking of a former non-exclusive franchise, while in the case of an exclusive franchise it does constitute a taking in the absence of a reserve power in the State. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; affirmed, 11 Pet. 420; *Hamilton Gas Company v. Hamilton*, 37 Fed. Rep. 832; affirmed, 146 U. S. 258; *Greenwood v. Freight Company*, 105 U. S. 13; *Binghampton Bridge*, 3 Wall. 51; *Tomlinson v. Jessup*, 15 Wall. 454; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Sioux City Street R'y Co. v. Sioux City*, 138 U. S. 98; *Louisville Water Company v. Clark*, 143 U. S. 1; *Schurz v. Cook*, 148 U. S. 397, 410; *New York and New England R. R. v. Bristol*, 151 U. S. 556, 567; *Covington v. Kentucky*, 173 U. S. 231; *Metropolitan R. R. Co. v. Highland Railway*, 118 Mass. 290, 293; *Thornton v. Marginal Freight Railway*, 123 Mass. 32; *Piscataqua Bridge v. New Hampshire Bridge*,

7 N. H. 35; *Boston and Lowell R. R. v. Salem and Lowell R. R. Co.*, 2 Gray, 1; *Power v. Village of Athens*, 99 N. Y. 592.

The act of 1893 authorized the city to supply itself and its inhabitants with water, provided, if the company so desired, the city should first vote upon the proposition to purchase the company's works. The city voted not to purchase, and did vote to ac-
131 cept the provisions of the act. The franchise rights granted to the company by its charter were not exclusive. This is not disputed. We have then presented the question, whether the subsequent grant to the city of the right to build competing waterworks constituted a *taking* of the plaintiff's property or franchise. It is the settled law of this country, established by the decisions of the Federal and State courts, that such a grant is not a *taking* of a former franchise giving any right to compensation. "Where the grant is not by its terms exclusive, the legislature is not precluded from granting a similar franchise or erecting a rival way or structure, the result of which may be to greatly impair or even totally destroy the value of the former grant, and such damage is not a *taking* of the former franchise which entitles its owner to compensation. This principle was settled in the leading case of *Charles River Bridge v. Warren Bridge*, and has been confirmed by numerous decisions." Lewis on Eminent Domain, sec. 136.

In the case of *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, the supreme court of Massachusetts held that the grant by the legislature of a competing franchise did not divest vested rights or impair the obligation of a contract.

On appeal (11 Pet. 420), the Supreme Court of the United States placed its decision on the latter ground. This was before the passage of the fourteenth amendment, so that the only Federal constitutional right involved related to contract.

In *Hamilton Gas Light Co. v. City of Hamilton*, 37 Fed. Rep. 832, 836, where a municipality was proceeding to construct competing gas works under a State statute, the point was taken that the statute interfered with vested rights, and impaired, if it did not destroy, the property of the company, and was in effect an appropriation of private property to public use without making compensation, in violation of the fourteenth amendment to the Constitution of the United States. The court decided against this contention.

In the Supreme Court, on appeal (146 U. S. 258), as appears from the statement of the case by the court on page 259, the plaintiff invoked the protection of the contract clause of the Constitution, as well as the clause that no State shall deprive any person of property without due process of law. The court, in its opinion, affirming the judgment below, only discusses the question whether there was any impairment of the obligation of a contract, and by im-
132 plication, at least (for the point was necessarily involved in the decision), held that the claim that the plaintiff was deprived of its property without due process of law was so untenable as a legal proposition as not to require discussion.

It may be said that since the decision in *Charles River Bridge v.*

Warren Bridge, the Supreme Court and other courts in this country have recognized the law as settled, that where the State grants a franchise, which is not by express terms made exclusive, the subsequent grant of a similar and competing franchise impairs no constitutional right; that it is neither a violation of the obligation of a contract, nor an impairment of vested rights, nor a taking of property without just compensation.

In *Fort Plain Bridge Company v. Smith*, 30 N. Y. 44, 61, the court observed:

"Since the case of *The Charles River Bridge v. The Warren Bridge* (11 Peters 420), it has been understood to be the law that it is competent for the legislature, after granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right so to do is expressly prohibited by the first grant."

In The *Salem and Hamburgh Turnpike Company v. Lyme*, 18 Conn. 451, 457, the court said:

"Since the decision of this court in the case of *The Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Company*, 17 Conn. R. 454, and of the Supreme Court of the United States in the case of *The Charles River Bridge v. The Warren Bridge*, 11 Peters, 420, and the numerous decisions to the same effect, cited in those cases, we do not think it an open question, whether a new road, canal, or bridge, materially diverting travel or business from an old one under a prior charter, is therefore unconstitutional, or to be suppressed."

In The *Lafayette Plankroad Company v. The New Albany & Salem Railroad Company*, 13 Ind. 90, 92, the court declared:

"The grant of a charter for a road, a bridge, or a ferry, does not estop the legislature from granting a subsequent charter for a road, bridge, or ferry, which may compete with the former in the transportation of freight and passengers between given points; and the simple fact that the two run parallel, and mutually diminish the business of each other, is no ground for a claim by either for damages."

133 Although the Supreme Court, in those cases where the exercise of this power by or under the State has been disputed, has usually confined the discussion of the alleged violation of constitutional rights to the contract clause, the language of the court in those cases is instructive, and has an important bearing on the specific question under consideration. In *Lehigh Water Company v. Easton*, 121 U. S. 388, 390, the court said:

"By constructing waterworks of its own, the borough will not destroy the franchises of the plaintiff company. It may impair their value, and probably will do so; but of this the company have no legal cause of complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the State by contract has precluded

itself from such new grant the incidental injury can constitute no obstacle."

In *Stein v. Bienville Water Co.*, 141 U. S. 67, 81, the court said:

"Guided by this rule, in respect to which there is no difference of opinion in the courts of this country, we are forbidden to hold that a grant under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of water works from a particular stream or river, prevents the State from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river."

In *Hamilton Gas Co. v. Hamilton*, 146 U. S. 258, the company maintained that its charter was exclusive. The city was proceeding to build works of its own, claiming statutory authority therefor. As we have already observed, the company in that case contended that this was an impairment of its charter, and a taking of its property without due process of law.

The court observed at page 268:

"It may be that the erection and maintenance of gas-works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties."

In *Pearsall v. Great Northern Railway*, 161 U. S. 646, 664, the court said:

"An exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no im-
134 pairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early day in the case of the *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, and has been steadily adhered to ever since."

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, was an appeal from the New York court of appeals. The court (p. 696) said:

"The court of appeals held that neither the statute under which the company was organized, nor the contract, nor the act of annexation, gave to the company rights exclusive and beyond the reach of legislative action. These conclusions of the court of appeals are vigorously challenged in the argument, but we are of opinion that they are correct. The statute simply provided for the organization of water companies. The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contained a covenant on the part of the town to pay certain hydrant rentals. But grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege."

As the franchise granted to the plaintiff by its charter was not

exclusive, the subsequent grant by the act of 1893 giving the city authority to construct independent and competing waterworks, was not a violation of the plaintiff's charter, or of any constitutional right.

In establishing the power of the legislature to grant a competing franchise, the conflict has been between the rightful claims of the public and the protection secured to private property by constitutional provisions. Before the case of *Charles River Bridge v. Warren Bridge* (1837), many eminent judges and lawyers were of the opinion that such legislation impaired vested rights of property and violated the contract between the State and the corporation secured by charter. In that case, however, it was successfully urged, though the court were divided in opinion, that the grant by the sovereign authority of a franchise to build a bridge over a public water-way, and to collect tolls, did not prohibit the grant of another franchise to construct a bridge over the same water-way which was free to the public, though the effect was to impair, or even destroy, the value of the first grant. Whatever doubt may have formerly existed as to this power of the legislature, and however cogent and just the argument may be against its exercise in a particular case, the right of the legislature to exercise it in any case cannot now be
135 questioned; and when a franchise is now obtained for the purpose of establishing waterworks, or to promote like enterprises in which the public are interested, and capital is invested, it should not be upon the assumption or belief that the town or city will refrain from competition and the legislature will refuse to authorize it. On the contrary, this legislative power having been upheld and enforced for so many years it may well be presumed that when a franchise is obtained which is not exclusive, it is taken with the knowledge and risk that the legislature is not precluded from granting, at any moment, a similar and competing franchise.

Before examining the act of 1894, it may be well to call attention to some preliminary considerations. The plaintiff contends that the *taking* in this case was wholly under the act of 1894, and that the act of 1893 never took effect, because the "vote to purchase" the company's works, under section 12 of the act, was a condition precedent to the city's right to vote to supply itself and its inhabitants with water under section 13; and the city having voted not to purchase, the act failed, and, consequently, the subsequent vote by the city to accept the provisions of the act was nugatory. This construction seems contrary to the intent and purpose of the act. The natural and reasonable construction of sections 12 and 13, looking at the whole act, is that the city should first decide whether it would purchase the plaintiff's works before determining whether it would build works of its own. For the purpose of our present inquiry, however, it is unnecessary to pass upon this question. If the act of 1893 were in force, as contended by the defendant, there was, as we have seen, no *taking* of the plaintiff's property under it. If it were not in force, there surely was no such taking. But whether legally in force or not, it clearly appears that it was the fear or belief of the

company, the city, and the legislature, that the act of 1893 was operative which led to the passage of the act of 1894.

After the vote by the city accepting the act of 1893, the company petitioned the legislature that the city should buy its property and franchise before proceeding to build waterworks under the act. Accompanying this petition was a proposed bill, which provided that the city should, "before proceeding to supply itself and its inhabitants with water under the authority of chapter four hundred and seventy-one of the Acts of the Year One thousand eight hundred and ninety-three, purchase from the Newburyport Water
136 Company the franchise, corporate property, and all the rights and privileges of said Newburyport Water Company." It further provided that the compensation to be paid by the city should be determined by three commissioners appointed by the supreme judicial court.

Thereupon, the legislature passed the act of 1894, obliging the city to purchase the plaintiff's works before proceeding to supply itself and its inhabitants with water under the act of 1893, and at the same time fixing the measure of compensation to be paid by the city.

Section 1 declares:

"If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport in writing that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants, under the authority of chapter four hundred and seventy one of the Acts of the Year Eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same."

The act then provides that whenever the city shall vote to purchase said property, "notice of the desire of said company to sell the same having been given as hereinbefore provided," the company shall within twenty days convey by deed its property to the city, and the city shall pay "the fair value thereof to be ascertained as hereinafter provided." If the parties are unable to agree upon the value of the property, commissioners are to be appointed "who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." Section 4 of the act declares:

"In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the supreme judicial court shall, upon peti-

tion of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase."

Before the consideration of what the plaintiff claims was the legal effect of this act let us refer for a moment to its manifest
137 purpose. Recognizing the act of 1893 as in force, it simply prohibits the city from exercising the right to build waterworks under that act if the plaintiff desires to sell its works to the city upon the terms provided. There is certainly nothing on the face of the act which authorizes the taking of the plaintiff's property without its consent. It does not in terms compel the company to sell its property to the city. On the contrary, it expressly declares that the company may do so if it "desires."

If the act provide for a voluntary conveyance, the insufficiency of the consideration prescribed has no bearing on the issue before us. The question of compensation becomes material only in the event that the sale under the act was made without the plaintiff's consent. If this does not appear, there is no violation of the constitutional right now invoked, whatever other relief the plaintiff may be entitled to.

The great injury which at this time threatened the company's property was municipal competition under the act of 1893, and the act of 1894 was passed as a protection against such impending disaster. The legislature might have provided in that act, and there is much force in the contention that in justice and equity it ought to have provided, that the plaintiff should receive full compensation for its property purchased by the city, but the failure of the legislature to make such provision cannot change the nature and scope of a statute which authorized a voluntary sale into a statute which authorized the taking of the plaintiff's property without its consent by right of eminent domain.

We will now consider more directly and specifically the general argument advanced by the plaintiff to establish a *taking* of its property without just compensation. This argument may be summarized as follows:

The act of 1893 never took effect and was void except so far as it was re-enacted in the act of 1894; the act of 1894 was in effect a threat by the State that it would authorize the city to build competing waterworks and so ruin the company, unless it consented to convey its property to the city without just compensation; that in consequence of such threat the company conveyed its property to the city; that by reason of such threat the deed of conveyance though voluntary in form was in fact compulsory; that
138 such compulsion constituted duress and made the conveyance a *taking;* that such taking was plainly without just compensation by the terms of the act. Stated in another form the proposition is that a threatened lawful grant by the State to *B* of a franchise similar to one already granted to *A* is an exercise of unlawful compulsion on the part of the sovereign authority, and that a voluntary conveyance of property under a statute containing such a threat, and not providing for full compensation, is voluntary only

in form, while in fact it is made under duress; that, consequently, such a statu-e in effect authorized a *taking* of property without just compensation in violation of a constitutional right.

The plaintiff's contention is founded upon the hypothesis that the right of the city to build competing waterworks under the act of 1893 did not exist when the act of 1894 was passed. If, however, the act of 1893 was in force at that time, as we are inclined to hold, then the State threatened nothing by the act of 1894 because it had already authorized municipal competition. In that case we are confronted with this question, whether, the city having the right to compete, it was lawful for the legislature to pass the act of 1894 forbidding the city so to do, providing the company chose to sell on terms which did not award full compensation for its property. But it can hardly be seriously urged that when the company was met by legal competition which meant ruin, it was unlawful for the legislature to pass an act which at least made the situation less disastrous, and providing at the same time that the company need not avail itself of the act unless it saw fit.

Nor is the situation any different in principle if we assume that the act of 1893 was void, and that we have only to consider the act of 1894. The only difference is that in one case the legislature had authorized legal competition, and in the other, as it is claimed, it threatened to authorize legal competition. But if competition be lawful, threatened competition is lawful. And if it were lawful for the State to authorize municipal competition, it was not unlawful for it to threaten to authorize municipal competition.

But it is urged, and this is the crucial point in the plaintiff's argument, that the threat of competition produced compulsion which amounted to duress, and, consequently, made the sale by the company to the city not a voluntary but a compulsory act, and being compulsory its effect was a *taking* of the plaintiff's property
139 without just compensation. The plaintiff's whole position hinges on the question of compulsion.

In approaching this question it may be observed that there was a greater degree of compulsion on the part of the State if we assume the act of 1893 was operative than if we assume it was void. In the former case municipal competition had actually been authorized, while in the latter case it was only threatened.

But what was the compulsion in this case? It was the compulsion arising from the fear of competition produced by what is termed the threat of the State to authorize municipal competition. If a person apprehensive of competition sells his property for less than its fair value, it cannot be said that in law the sale was voluntary in form only, and in fact compulsory. In a certain sense, such a sale is compulsory. It is, however, a kind of compulsion which will always exist so long as competition exists. But this is not the kind of compulsion that amounts in law to duress because it lacks the essential ingredient of duress, namely, illegality. It is unlawful compulsion which constitutes duress. "Duress exists," says Judge Cooley, "when one, by the unlawful act of another, is induced to make a

contract or perform some act under circumstances which deprive him of the exercise of free will." *Hackley v. Headley*, 45 Mich. 569, 574. Duress by the Government or its officers, in this class of cases, is defined by the Supreme Court as "moral duress not justified by law." *Maxwell v. Griswold*, 10 How. 242, 256. It must be the pressure arising from unlawful acts or demands on the part of the Government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form, involuntary and void. In this class of cases the test is, was the cause of the compulsion lawful or unlawful. If the compulsion be founded on lawful competition, or the threat of lawful competition, there is no element of illegality about it. Such compulsion is justified by law.

The whole question of compulsion or duress in this case turns upon whether municipal competition, actual or threatened, under the authority of the State, was justified by law. If it were, as we have shown, then the deed to the city was not given under unlawful compulsion or duress, but was voluntary in fact and in law. On the other hand, it may be said, that if it had been unlawful for the State to authorize municipal competition, then the threat so to do might have been held to have amounted to duress not justified by law,
140 and, consequently, the deed of the plaintiff's property to have been in effect a *taking* without just compensation under the authority of the State.

In the Supreme Court cases relied on by the plaintiff it will be found that the compulsion or duress was based upon an illegal act or exaction, or threatened illegal act or exaction, by the Government or its officers.

United States v. Tingey, 5 Pet. 115, 129, was a suit brought by the Government upon a bond, variant from that prescribed by law, demanded of a public officer upon the peril of losing his office. Mr. Justice Story, delivering the opinion of the court, said:

"The substance of this plea is, that the bond, with the above condition, variant from that prescribed by law, was, under color of office, extorted from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the condition of his remaining in the office of purser, and receiving its emoluments. There is no pretence then to say, that it was a bond voluntarily given, or that, though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office, against the requisitions of the statute. It was plainly, then, an illegal bond; for no officer of the Government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law; that would be, not to execute, but to supersede, the requisitions of law; it would be very different, where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office."

Maxwell v. Griswold, 10 How. 242, was a case where an appraisement of imported goods was erroneously made as to the point of time of the valuation, and the importer paid the consequent excess of duties. The Government contended that this was voluntary. The court (p. 256) said:

"But this addition and consequent payment of the higher duties were so far from voluntary in him, that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him.

Now, it can hardly be meant in this class of cases, that, to make a payment involuntary, it should be by actual violence, or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment.

141 All these requisites existed here. We have already decided, that the demand for such an increased appraisal was illegal. The appraisal itself, as made, was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer, and was submitted to merely as a choice of evils.

He was unwilling to pay either the excess of duties or the penalty, and must be considered, therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however well meant may have been the views of the collector.

The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

In *Swift Company v. United States*, 111 U. S. 22, 28, the plaintiffs, who were manufacturers of matches and furnished their own dies for the stamps used by them, and were thereby entitled to a commission of ten per cent. in money on the price of the stamps, accepted for a long period their commissions in stamps because the Treasury Department would pay in no other manner. The court held that the apprehension of being stopped in their business by this illegal exaction was a sufficient moral duress to make their payments involuntary. Mr. Justice Matthews, delivering the opinion of the court, said:

"The question is, whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It

was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*."

In support of the position taken, the court (p. 29) referred to numerous cases:

"In *Close v. Phipps*, 7 M. & Gr. 586, which was a case of money paid in excess of what was due in order to prevent a threatened sale of mortgaged property, Tindal, C. J., said: 'The interest of the plaintiff to prevent the sale, by submitting to the demand, was so great, that it may well be said the payment was made under
142 what the law calls a species of duress.' And in *Parker v. Great Western Railway Company*, 7 M. & Gr. 253, the wholesome principle was recognized that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary, and might be recovered back. Illegal interest, paid as a condition to redeem a pawn, was held in *Astley v. Reynolds*, 2 Stra. 915, to be a payment by compulsion. This case was followed, after a satisfactory review of the authorities, in *Tutt v. Ide*, 3 Blatchf. 249; and in *Ogden v. Maxwell*, 3 Blatchf. 319, it was held that illegal fees exacted by a collector, though sanctioned by a long continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary."

The court then cites *Maxwell v. Griswold*, 10 How. 242, and other cases.

In *Robertson v. Frank Brothers Company*, 132 U. S. 17, a customs official proceeded in his appraisement upon a wrong principle contrary to law, and it was held that the compulsory insertion, under threat of an onerous penalty, by the importer of such additional charges upon the entry and invoice, which necessity involved the payment of increased duties, makes the payment of those duties involuntary.

In delivering the opinion of the court, Mr. Justice Bradley (p. 24) said:

"In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment."

Mr. Justice Bradley in that opinion refers to the language of the decisions in *Maxwell v. Griswold*, and *Swift Company v. United States* which we have cited, and in speaking of the former case he declares that "the ultimate fact was the moral duress not justified by law."

In the above cases, which are cited by the plaintiff, it is seen that it is the element of illegality which lies at the foundation of this

species of duress. In those cases the moral duress was caused by the illegal acts or demands of the Government or its officers. In the case at bar there was no moral duress not justified by law, because it was lawful for the State to authorize, or threaten to author-
143 ize, municipal competition. There would have been a close analogy between those cases and the present, if the plaintiff had possessed an exclusive franchise, and the legislature had, contrary to law, authorized, or threatened to authorize, municipal competition. In that event it might have been claimed that the company was compelled to convey its property to the city under an unlawful exercise of legislative power, and, therefore, under moral duress not justified by law.

The plaintiff argues that the measure of compensation provided by the act of 1894 was not justified by law, and that, consequently, the principle recognized in the above cases is applicable to the present case. But this is an attempt to connect things that are entirely distinct. The compensation to be paid for the plaintiff's property has nothing to do with the subject of duress. It was not the want of just compensation, but the threat of municipal competition, which was the cause of the alleged duress. To connect the alleged duress with the lack of compensation involves the proposition that the compulsion which forced the plaintiff to deed its property to the city was owing to the unlawful compensation provided by the act of 1894, and not to the threatened competition by the city. The want of just compensation has no bearing on the question before us unless the plaintiff first establishes a duress not justified by law.

And this brings us to the decisive point on the issue under consideration, and the conclusion we have reached.

We hold, for the reasons already given, that the grant of a competing franchise to the city in this case was a lawful exercise of legislative power, and that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power, and that, being lawful, it could not in either case have the legal effect of making a voluntary conveyance of the plaintiff's property, compulsory and void, and that, consequently, the plaintiff has failed to establish a *taking* of its property without just compensation under the authority of the State.

Upon the single question submitted for our determination, and without passing on any other question concerning the plaintiff's relief under the bill, we are of opinion, after careful consideration, that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States, and a decree may be drawn accordingly.

144 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Before Colt and Brown, JJ.

Opinion, March 5, 1902.

Per curiam (as amended): It has been decided by this court, upon full and careful consideration, that there was no taking of the complainant's property under the acts of 1893 and 1894; that the deed of the complainant's property was voluntary, and not compulsory; and that, consequently, the complainant had not been deprived of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States. The complainant now maintains that the act of 1894 was in violation of section 10 of article 1 of the Constitution, which provides that "No State shall pass any law impairing the obligation of contracts." The complainant raises this question by asking the court to admit the testimony of the commissioners appointed to value the complainant's property under the act of 1894 to the effect that they did not in fact value the water contract entered into between the complainant and defendant.

145 The act of 1893 authorizes municipal competition, which the legislature had legal right to authorize. The act of 1894 forbids municipal competition, provided the complainant chose to deed its property to the defendant on the terms specified. This act did not impair any contract which had been entered into between the complainant and defendant. It simply gave the complainant the option if it chose, to sell its property to the defendant on the terms mentioned. The complainant, if it so desired, could have retained its property and its contract with the defendant; but it did not do so, and voluntarily deeded its property to the defendant. If it lost any right to any contract by this action, it was because it deemed it wise to take advantage of the provisions of the act of 1894, which obliged the defendant to buy the water works, if the complainant so desired, before it should undertake to build water works of its own.

Assuming that this testimony could properly be offered at this stage of the case (a question which we do not find it necessary to pass upon), and that the complainant could show that the commissioners did not in fact value the water contract in estimating the value of the complainant's property, we are of the opinion that this testimony would not be material and that it would be entirely ineffectual. It does not tend to prove that the act of 1894 was in violation of the contract clause of the Constitution, because what was

done or omitted by commissioners appointed under the act could not affect the terms of the legislative act itself or make the act unconstitutional. Furthermore, after a full hearing upon the question of duress, this court has already decided that all the proceedings which took place under the act of 1894 were entered into
146 voluntarily by the complainant in order to avoid great disaster arising from municipal competition.

Our conclusion upon this point is conclusive against the admission of the testimony offered by the plaintiff, that the commissioners did not value the water contract.

The motion to enter the final decree dismissing the bill is granted.

146a Circuit Court of the United States, District of Massachusetts.
In Equity.

GLOUCESTER WATER SUPPLY COMPANY
v.
CITY OF GLOUCESTER. } No. 1519.

L. L. Scaife, Robert M. Morse, for complainant.

A. E. Pillsbury, specially, John J. Burke, Charles A. Russell, for defendant.

Docket Entries.

May T., 1901, July 1.—Bill filed, subpœna issued, returnable Aug. rules, to wit: Aug. 5, 1901.
Sept. 3.—Demurrer filed.
May T., 1902, June 23.—Heard on demurrer before Colt, J.
" " Colt, J. Rescript filed, demurrer sustained.
Sept. 30.—Agreement to amend record filed.
Oct. 1.—Colt, J. Final decree, bill dismissed with costs, decree in files.
Oct. T., 1902, Dec. 8.—Claim of appeal filed.
" "—Assignment of errors filed.
" "—Colt, J. Bond on appeal approved and filed and appeal allowed.
" "—Colt, J. Citation issued, returnable Jan. 5, 1903.

147 *Claim of Appeal.*

(Filed Dec. 8, 1902.)

The above named plaintiff, Gloucester Water Supply Company, considering itself aggrieved by the order and decree entered October 1, 1902, in the above entitled proceedings, doth hereby appeal from said decree to the Supreme Court of the United States, and

prays that this its appeal may be allowed, and that the transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROBERT M. MORSE,
LAURISTON L. SCAIFE,
Counsel for Plaintiff.

148 *Assignment of Errors.*

(Filed Dec. 8, 1902.)

Comes now The Gloucester Water Supply Company, appellant, (the plaintiff in the court below,) and says that there is manifest error in the records and proceedings of the circuit court of the United States for the district of Massachusetts in this suit as follows:

I. The court erred in this: That it held that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

II. The court erred in this: That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the State.

III. The court erred in this: That, although it held that the sale of the company's property was compulsory in fact, it held that such sale was not compulsory in law.

IV. The court erred in this: That it did not hold that the act of 1895, being chapter 451 of the Massachusetts Acts of 1895, was compulsory in law as well as in fact, and constituted duress.

V. The court erred in this: That it held, in effect, that the threatened grant to the defendant, The City of Gloucester, of a competing franchise under said act of 1895 (being chapter 451 of Massachusetts Acts of 1895) was a lawful exercise of legislative power.

149 VI. The court erred in this: That it did not hold that by said act of 1895, (chapter 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts deprived and deprives plaintiff of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States and of plaintiff's rights thereunder.

VII. The court erred in this: That it held, in effect, that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I of the Constitution of the United States.

VIII. The court erred in this: That it did not hold that said act of 1895 (being chapter 451 of Massachusetts Acts of 1895), impaired and impairs the obligation of plaintiff's contracts with defendant, The City of Gloucester, alleged in plaintiff's bill in this suit, (including plaintiff's franchises), and thereby violates section 10 of article

I of the Constitution of the United States and plaintiff's rights thereunder.

IX. The court erred in this: That it held in effect that, by said act of 1895, (being chapter 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts did not and does not deny to plaintiff the equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States and of plaintiffs rights thereunder.

X. The court erred in this: That it did not hold that, by said act of 1895 (being chapter 451 of Massachusetts Acts of 1895),
150 as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts denied and denies to plaintiff the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States and of plaintiffs rights thereunder.

XI. The court erred in this: That it held as follows: "This case, in our opinion, is governed by the case of The Newburyport Water Company *vs.* City of Newburyport."

XII. The court erred in this: That it sustained the defendant's demurrer to plaintiff's bill.

XIII. The court erred in this: That it ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.

XIV. The court erred in this: That it did not overrule the defendant's demurrer.

Wherefore the said Gloucester Water Supply Company, appellant, prays the honorable court to examine and correct the errors assigned, and for a reversal of the decree of the said circuit court entered in the above cause.

GLOUCESTER WATER SUPPLY COMPANY,
By ROBERT M. MORSE,
LAURISTON L. SCAIFE,
Counsel.

LAURISTON L. SCAIFE,
Solicitor for Gloucester Water Supply Company.

151 *Bond to Party on Appeal.*

(Filed and approved Dec. 8, 1902.)

Know all men by these presents, that we, The Gloucester Water Supply Company, of Massachusetts, as principal, and George H. Norman, as surety, are held and firmly bound unto the City of Gloucester of Massachusetts, in the full and just sum of five hundred dollars to be paid to the said City of Gloucester, its certain attorney, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of December, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of the United States for the district of Massachusetts, in a suit in equity depending in said court between said Gloucester Water Supply Company, plaintiff, and said City of Gloucester, defendant, a decree was entered against the said Gloucester Water Supply Company and the said Gloucester Water Supply Company having obtained an appeal to remove said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said City of Gloucester citing and admonishing it to be and appear in the said Supreme Court of the United States at Washington, on the fifth day of January, A. D. 1903.

Now, the condition of the above obligation is such, that if the said Gloucester Water Supply Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

GLOUCESTER WATER SUPPLY COMPANY, [SEAL.]
By GEORGE H. NORMAN.
GEORGE H. NORMAN. [SEAL.]

Sealed and delivered in presence of
C. E. COWAN,
(As to G. W. S. Co. and G. H. N.)

Approved:
LE BARON B. COLT,
Circuit Judge.

152 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to City of Gloucester, a municipal corporation duly established under the laws of the Commonwealth of Massachusetts and located in the county of Essex, in said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* fifth day of January next, pursuant to an appeal duly obtained from a decree of the† circuit court of the United States for the district of Massachusetts wherein The Gloucester Water Supply Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and located therein, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, judge of the circuit court of the United States for the district of Massachusetts, this eighth day of December, in the year of our Lord one thousand nine hundred and two.

LE BARON B. COLT,
U. S. Circuit Judge.

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* Not exceeding 30 days from the day of signing.
† Name of court in which the decree is entered.

153 *Acknowledgment of Service on Citation on Appeal.*

DEC. 11, 1902.

Service of the within citation is hereby accepted, with the same effect as though the same had been served by the marshal, but without prejudice to any other rights of the appellee.

A. E. PILLSBURY,
For The City of Gloucester, Appellee.

154 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

I, Alexander H. Trowbridge, clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled, No. 1519 Gloucester Water Supply Company, complainant, *v.* City of Gloucester, defendant, in said circuit court determined, the opinions of the circuit court, dated, respectively, February 24, 1898, August 8, 1900, and March 5, 1902, filed in case No. 924, equity, Newburyport Water Company *v.* City of Newburyport (by which case the court held in the rescript filed herein June 23, 1902, that the present case is governed) the docket entries, the claim of appeal, the assignment of errors and the bond to party on appeal, and also the original citation issued upon the appeal of the complainant in said cause, with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this thirty-first day of December, A. D. 1902.

[Seal of the Circuit Court, Massachusetts.]

ALEX. H. TROWBRIDGE, *Clerk.*

Endorsed on cover: File No. 18,771. Massachusetts C. C. U. S. Term No. 183. The Gloucester Water Supply Company, appellant, *vs.* The City of Gloucester. Filed January 2, 1903.